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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

FEDERAL TRADE COMMISSION,

Plaintiff(s),

v.

JEREMY JOHNSON, et al.

Defendant(s).

Case No.: 2:10-cv-2203-MMD-GWF

**DEFENDANTS’ MEMORANDUM OF POINTS AND AUTHORITIES IN  
OPPOSITION TO FTC’s MOTION FOR SUMMARY JUDGMENT  
AGAINST ALL CORPORATE LIABILITY DEFENDANTS (DE 1235; 1280)**

**CITATION FORM**

The following citation forms are used in this memorandum:

References to the FTC’s memorandum are to the number at the top of the page.

Depositions are cited by Exhibit number, deponent name, then page(s):line numbers.

Declarations are cited by Exhibit number, declarant name, then paragraph number.

Expert reports are cited as “[expert name] Rept.,” then the page number(s).

**SCOPE OF CITED MATERIALS**

Under F.R.Civ.P. 56(c)(1), the moving party on a motion for summary judgment “must support the assertion by: (A) citing to particular parts of materials in the record....” In response, the non-moving parties may show that “the materials cited do not establish the absence or presence of a genuine dispute ....” *Id.* § -(B). While the FTC has filed several complete depositions, declarations, etc., pursuant to Rule 56(c)(1), defendants have responded only to the “particular parts of materials” cited by the FTC. Thus, for example, if the FTC cites ¶ 5 of a declaration, the defendants have responded to, objected to, or otherwise addressed only ¶ 5.

**SUMMARY JUDGMENT STANDARD**

As the moving party, the FTC bears the burden of showing that there are no genuine issues of material fact. *FTC v. Gill*, 71 F. Supp. 2d 1030, 1037 (C.D. Cal. 1999), *aff’d*, 265 F.3d 944 (9th Cir. 2001). Facts are construed in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

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**MEMORANDUM IN OPPOSITION TO FTC’S MOTION FOR SUMMARY  
JUDGMENT AGAINST ALL CORPORATE DEFENDANTS**

**Introduction**

Early in this case, after reviewing the FTC’s preliminary injunction evidence – most of which is repeated in the FTC’s current motion – and IWorks’ response, Judge Hunt observed:

THE COURT: [L]et me just advise the parties that the Court is ruling and will enter the order that the Preliminary Injunction will issue.

Just, I guess, a couple of comments with respect to that. That does not preclude for the defendants – well, let me say this first and then let me make that comment. [FTC] Counsel suggested that this likely was a summary judgment case. From what I’ve heard today, the Court, quite frankly, finds it unlikely that this is a matter that can be resolved by summary judgment. There appears to me that there are going to be a lot of factual issues that are contested in this matter, particularly with respect – well, both with respect to liability and with respect to damages ultimately. There could be, will be issues there. [DE 184, 161:8-22]

That observation is even more true now, where depositions and expert testimony have exposed material flaws in the FTC’s case. The FTC claims to have “overwhelming” evidence. Of course, the amount of evidence is irrelevant on a motion for summary judgment – it is whether the evidence is *undisputed* that matters. As the Ninth Circuit has stated, “The amount of evidence required to avoid summary judgment is ‘minimal,’” and evidence adduced by a non-moving party must be assumed true.<sup>1</sup>

In any event, however, the FTC’s characterizations are simply not true. To a great extent, the FTC conflates hyperbole with undisputed evidence. Dismissive pronouncements that the defendants “bilked” and “duped” consumers add nothing to the debate. *Big Dipper Entm’t, LLC v. City of Warren*, 641 F.3d 715, 719 (6th Cir.2011) (“[T]he better practice is usually to lay out the facts and let the court reach its own conclusions.”).

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<sup>1</sup> *Teutscher v. Riverside Sheriffs Ass’n*, 492 F. App’x 719, 720 (9th Cir. 2012); *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012).

1 The FTC should, in fact, have a perfect case. Consider:

- 2 • The FTC spent years investigating IWorks, beginning in 2008, most of that time  
3 without IWorks' knowledge<sup>2</sup>;
- 4 • Two FTC investigators were assigned to IWorks for one to three years, during  
5 which time they were assigned to only one other case<sup>3</sup>;
- 6 • The FTC had access to IWorks' servers for months before the lawsuit – access so  
7 direct that it could contact customers immediately after purchases<sup>4</sup>;
- 8 • The FTC was secretly working with an IWorks employee and an IWorks  
9 consultant while they were still working with (and being paid by) IWorks<sup>5</sup>;
- 10 • As part of this years-long investigation, the FTC had access to what it says are  
11 “nearly 3,000” Better Business Bureau or Attorney General complaints (out of more than 10  
12 million customers), and it contacted consumers from those complaints;
- 13 • Since the preliminary injunction, the FTC has been able to obtain material from  
14 the Receiver without the constraints of following the Rules of Civil Procedure<sup>6</sup>;
- 15
- 16
- 17
- 18
- 19

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20 <sup>2</sup> In October 2008, FTC investigator Menjivar studied sites featuring IWorks products, submitted  
21 information to a site offering a Grant Funding Solutions kit, printed pages, etc. (Exh. 1800, Menjivar  
22 depo., pp. 14:25-15:6; 52:19-53:15.) Mr. Menjivar said his investigation began as a Do Not Call inquiry,  
but that in the course of such investigation, he would look for any potential FTC Act violations. (*Id.*, pp.  
98:7-101:2; pp. 108:22-109:15.)

23 <sup>3</sup> Exh.1801, Jacobsen depo., p. 43:7-12; DE 1241-1, Exh. 1655, Tyndall depo., p. 48:16-18.

24 <sup>4</sup> Exh. 1802, Melton depo., pp. 17:20-18:11; DE 1241-1, Exh. 1655, Tyndall depo., p. 214:4-9.

25 <sup>5</sup> DE 1240-1, Exh. 1642, Marker depo., pp 26:21-27:7; Exh. 1803, Porter depo., pp. 28:9-30:7.

26 <sup>6</sup> While it might be convenient for the FTC to obtain material this way, there is a cost, *i.e.*, the documents  
27 are not self-authenticating. *Hussein v. Univ. & Cmty. Coll. Sys. of Nevada*, 304-CV-0455 JCM RAM,  
28 2007 WL 4592225 at \*1–2 (D. Nev. Dec. 28, 2007) (“To authenticate a document through production  
during discovery, the Ninth Circuit requires: 1) the producer of the document be identified; *and* 2) the  
party producing the document admit its production. . . . Accordingly, the documents defendants claim



1           • For most of the case, the FTC did not have the inconvenience of opposing  
2 counsel.<sup>7</sup>

3           So, what does the FTC actually have? It began the case with the declarations of 16 out  
4 of some 10,000,000 customers (0.0000016, or 0.00016 percent).<sup>8</sup> Of those, the FTC no longer  
5 claims that three have any relevance; that leaves 13.<sup>9</sup>

6           Of the 13 remaining consumers, three purchased from a website that the FTC knows was  
7 not an “IWorks” website; that leaves 10.<sup>10</sup>

8           Of the 10 remaining consumers, fewer than half testified that they could say with  
9

10  
11  
12 were authenticated by production during discovery, and which plaintiff neither admits production nor  
13 authenticity, are inadmissible.” (Emphasis in original.) A receiver, of course, is not a party or  
14 representative of any party, *N. Am. Broad., LLC v. United States*, 306 F. App’x 371, 373 (9th Cir. 2008),  
15 and the FTC’s informal method of seeking material does not include the procedural protections that  
16 warrant self-authentication when material is produced by a party: For example, the defendants would  
17 have had no knowledge of what material was requested, where it came from (if it was provided), its  
18 original format, etc.

19 <sup>7</sup> In many, if not most, FTC cases, defendants are unable to mount a meaningful defense. Cases often  
20 begin with asset freezes, after which defendants often cannot find or afford legal representation. Thus,  
21 for example, in many of the FTC cases cited by the FTC, consumer declarants were not deposed, liability  
22 experts were not retained or deposed, etc. *See, e.g., FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127,  
23 1136 (9th Cir. 2010); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199 (D. Nev. 2011). In a sense,  
24 FTC case law is recursive: A decision is issued without a meaningful defense presented. That decision is  
25 then cited in another FTC case, again for which no defense is presented, producing another ruling that is  
26 then cited in another case, etc. The same would have been true in this case had the FTC not brought in  
27 family members near the end, allowing some corporations to also become represented. This case thus  
28 presents a rare instance in which the FTC’s evidence is actually being tested. *See, e.g., FTC v. Enforma  
Natural Products*, 362 F.3d 1204 n.14 (9th Cir. 2004) (distinguishing prior FTC case in which FTC’s  
expert testimony had been uncontroverted).

<sup>8</sup> DE 1262-1, Exh. 1426, Vigil Rept. Ex 11 (IW Rog 13 Final 06-16-10.xlsx).

<sup>9</sup> The three consumer-declarants not cited in the FTC’s memorandum are Beatriz Redd, John Merrell,  
and Vincent Valenti.

<sup>10</sup> In his deposition, FTC investigator Jacobsen admitted that the FTC could not tie purchases on  
“GotBody.com” to IWorks. Indeed, Mr. Jacobsen admitted that he chose not to attach or even produce  
the FTC’s credit card records relating to GotBody because they “did not support the FTC’s allegations.”  
Exh. 1801, Jacobsen depo., pp. 143:20-148:21; pp. 150:8-151:21; *see also* 221:7-25 (did not include  
GotBody in list of sales figures allegedly attributable to IWorks-related sites).

1 certainty that there were no disclosures on the websites they visited. Indeed, several testified  
 2 that they did remember seeing disclosures, or that they believed the disclosures were “likely”  
 3 there.<sup>11</sup> Others testified so differently from their declarations (all drafted by FTC investigator  
 4 Reeve Tyndall) as to invite substantial cross-examination at trial not only of the declarants, but  
 5 of Mr. Tyndall.<sup>12</sup>

7 Given the dearth of customers to support its case, what about ex-employees? IWorks  
 8 had hundreds of employees, surely a smorgasbord for a governmental agency investigating a  
 9 “massive . . . far-reaching . . . scheme.”<sup>13</sup> This is what the FTC came up with:

11 • one ex-employee (Sara Marker), who lied on her resume, whose friend was fired  
 12 by IWorks, who considers herself a witness for the government in the criminal case against

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15 <sup>11</sup> See fn. 65, *infra*.

16 <sup>12</sup> For example, in two declarations, Mr. Tyndall wrote that an “IWorks”-related charge had put the  
 17 consumers into their overdraft, which the consumers testified was not true (DE 1237-1, Exh. 1600,  
 18 Bachman depo., pp. 95:2 - 97:14; 100:5 - 102:5; Exh. 1647, Miller depo., pp. 54:4 - 58:16). In one  
 19 declaration, Mr. Tyndall wrote that the witness said “I could not find any personal grants that I qualified  
 20 for,” but the witness testified that she was not actually interested in grants and did not attempt to look for  
 21 any, Exh. 1804, Blohm depo., pp. 35:9 - 36:15, 40:16-21; pp. 42:7 - 43:15; 44:6-24. In another  
 22 declaration, Mr. Tyndall wrote that the witness was unemployed when she bought an IWorks CD and  
 23 struggled to pay bills every month, but the consumer said she was only on a few weeks’ leave from her  
 24 long-term employer at the time, did not struggle every month, and in fact had no debt, DE 1238-4, Exh.  
 25 1620, Huffman depo., pp. 13:21-14:5; 24:17-25:10; 32:13-34:4. In another declaration, Mr. Tyndall  
 26 wrote that pages similar to the website viewed by the witness were attached, but the witness testified that  
 27 Mr. Tyndall simply sent him webpages and he had no idea if they were similar, Exh. 1805, Cienfuegos  
 depo., pp. 20:14-21:12. In another declaration, Mr. Tyndall wrote that the witness had incurred charges  
 after buying a product from an IWorks-related website, but the witness indicated she had actually bought  
 it from some telemarketer, Exh. 1806, Redd depo., pp. 59:17-24; 40:16 - 48:23; 83:21-24; 91:4-92:18.  
 In another declaration, Mr. Tyndall wrote that FedGrantUSA had made unauthorized charges on the  
 witness’s credit card, but the witness was really a victim of an identity thief who had purchased many  
 products from many different vendors, all of which was omitted by Mr. Tyndall, Exh. 1807, Merrell  
 depo., pp. 31:1-14; 37:9-15. As Mr. Merrell put it, Mr. Tyndall’s draft of his declaration stated things  
 more strongly than the witness believed, and Mr. Tyndall was “adding statements that weren’t  
 necessarily accurate.” *Id.*, pp. 25:6 - 26:11.

28 <sup>13</sup> <http://www.ftc.gov/news-events/press-releases/2010/12/ftc-charges-massive-internet-enterprise-scamming-consumers-out> (FTC press release), accessed January 15, 2014.

1 IWorks – yet who admitted in her deposition that the order pages for IWorks products usually  
 2 did have valid disclosures, contrary to the FTC’s allegations<sup>14</sup>;

3 • another ex-employee (Tracey Kramm) who worked in the same department as  
 4 her friend Ms. Marker, who lacked personal knowledge of most of IWorks’ operations, who  
 5 was so angry at being fired that she considered suing IWorks, and who turned another company  
 6 in to the FTC after it did not hire her<sup>15</sup>;

8 • another fired employee (Chris Cox), hurriedly contacted by the FTC near the end  
 9 of discovery, who agrees that the FTC correctly identified him as a “disgruntled” ex-employee –  
 10 yet who also confirms that IWorks’ order pages had valid disclosures, and that the one IWorks  
 11 product with which he was familiar (AdWords) was a good product with which consumers  
 12 could make money. *See* p. 20, *infra*.

14 • one other briefly mentioned ex-employee, Devan Partridge, who testified before  
 15 a grand jury that he felt “intimidated” by the FTC in connection with his declaration. DE-1000,  
 16 Exh. B, § 19.

18 That is it for IWorks ex-employees. So, what about experts? The FTC offers two:

19 • Dr. David Bauer regarding grants – who admits that all of his opinions hinge on  
 20 a definition of “grant” that is completely inconsistent with how ordinary consumers use the  
 21 word (a definition so narrow that even the well-known “Pell Grant” would not be considered a  
 22 grant), and who ran illogical searches for grants. (For example, in the context of credit card  
 23 bills, he ran a search for “repayment” and not “payment” – but who has ever said, “I need to  
 24

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26  
 27 <sup>14</sup> DE 1240-1, Exh. 1642, Marker depo., pp. 43:18-25; 18:11-12; 28:5-8; 39:9–41:2; 265:25-267:14.

28 <sup>15</sup> DE 1239-7, Exh. 1638, Kramm depo., pp. 37:4-2; 38:24.

1 repay my credit card bill today?”) *See* p. 12-14, *infra*.

2 • Dr. Nathaniel Good regarding web site design – who admits that all of his  
3 opinions involve only “best practices” ideals, and who advised vendors in 2007 to put  
4 disclosures on the order page, not the landing page – contrary to what the FTC now argues. *See*  
5 pp. 24, 30, *infra*.

7 The FTC’s case is thus weak even before considering the defendants’ expert witnesses,  
8 who thoroughly refute the FTC’s allegations – largely without contradiction. *See infra*.

9 **THE FTC HAS NOT ESTABLISHED THE ABSENCE OF ISSUES OF MATERIAL**  
10 **FACT, AS REQUIRED TO DEPRIVE THE DEFENDANTS OF A TRIAL.**

11 **I. COUNTS I, II, AND VI (grants)**

12 The FTC’s memorandum combines Counts I, II, and VI from its Amended Complaint;  
13 accordingly, these defendants do the same.

15 **A. Factual Background of IWorks’ Grant Program.**

16 IWorks developed and marketed a grant program to fill a need, an inability to identify  
17 grants for which a consumer might be eligible among the thousands of public and private  
18 resources available.<sup>16</sup> It distilled hundreds of thousands of pages of information on government  
19 (federal, state, and local), foundation and other private and corporate grants into a searchable  
20 grant database. IWorks’ idea was innovative: At the time, there was no other resource  
21 available online that offered this scope of information.<sup>17</sup>

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24 <sup>16</sup> DE 97, Payne dec., ¶ 3; see also DE 1240-2, Exh.1647, Miller depo., pp. 13:9-14:9 (was interested in  
25 online help to find grants because she had made inquiries and no one knew where to tell her to start). It  
26 also provided a service in rural areas, where grant resources such as Foundation Center books were  
27 prohibitively expensive for small libraries. (Exh. 1803, Porter depo., pp. 127:23 - 128:20; Exh. 1808,  
Browning Rept., p. 5.)

28 <sup>17</sup> Exh. 1808, Browning Rept, p. 6. The FTC says that, at one point, IWorks “illegally” imported  
Foundation Center material into part of its database. Whether that occurred or for what period is

1 Unlike faux grant programs targeted by the FTC, IWorks invested substantial resources  
 2 in its product. It retained the services of Dr. John Porter, a certified grant writer and Executive  
 3 Director of the American Grant Writers' Association. Among the things that Dr. Porter was  
 4 responsible for was regularly updating the site with information about grants available in the  
 5 United States, and he did so.<sup>18</sup>  
 6

7 IWorks' grant program offered an instructional CD and enrollment in a member site  
 8 with a searchable database, step-by-step instructions for completing grant applications, tips for  
 9 successful applications, online assistance in the form of a chat feature, grant application  
 10 templates, and other resources.<sup>19</sup> In return for his services, IWorks paid Dr. Porter a salary from  
 11 April 2007 through October 2010, in total, approximately \$153,750.<sup>20</sup>  
 12

13 IWorks' member site offered a valuable service, one that Dr. Porter believed that IWorks  
 14 could have charged \$600 for, "definitely worth" \$39 per month or more while a customer was  
 15 searching for information.<sup>21</sup>  
 16

#### 17 **B. The FTC's allegations.**

18 The FTC's memorandum devotes the most attention to what it calls "IWorks' grant  
 19 product scheme." The FTC claims two types of deceptive practices: 1) "IWorks represented  
 20

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21 immaterial: the FTC has no standing to litigate potential copyright disputes. The only relevance of its  
 22 statement to this case is that, if true, it would reflect a broad scope of information in the database.

23 <sup>18</sup> *E.g.*, Exh. 1803, Porter depo., p. 160:11-20 (current as of September 18, 2007), p. 190:2-11 (May 17,  
 24 2008), p. 192:1-8 (September 9, 2008), pp. 190:23 - 192:23 - 193:5; p. 206:1-24 (late July-early August  
 25 2009). Some resources periodically changed, as application periods expired, links changed, etc., but the  
 site was kept reasonably up to date throughout this period. *Id.*, and pp. 207:9 - 208:16.

26 <sup>19</sup> DE 097 Payne dec § 5; Exh. 1803, Porter depo., pp. 10:17 - 17-25.

27 <sup>20</sup> DE 097 Payne, ¶ 5; Exh. 1803, Porter depo., p. 202:4-12.

28 <sup>21</sup> Exh. 1803, Porter depo., p. 166:12-15, citing depo. exh. 926; p. 232:12-17, citing depo exh. 941.

1 that government grants were generally available for personal expenses and that consumers using  
 2 its grant product were likely to obtain such grants,” which representations “were false”; and 2)  
 3 “IWorks Represented that consumers were likely to obtain grants such as those described in its  
 4 testimonials,” which representations “were false.”  
 5

6 From the inception of this case, the FTC’s claims have hinged on a contention that, to  
 7 quote the FTC’s expert, “there are no government grants to pay personal expenses.”<sup>22</sup> Given  
 8 this focus, the FTC’s motion challenges only websites that exclusively promoted government  
 9 grants. Stated differently, the FTC’s memorandum does not challenge websites that promoted  
 10 government *and private* grants. (See FTC Mem., pp. 3-14.)  
 11

12 Because it cannot challenge sites that mention private grants (among other things, it  
 13 would require an untimely amendment to its Complaint and expert designations) the FTC asks  
 14 the Court either to ignore those sites, or to find that there were none (its memorandum is unclear  
 15 on this point). The FTC states (at p. 18:4, fn. 53):  
 16

17 None of the active IWorks, Inc. grant product sales websites produced by third party  
 18 PVI referenced “private” grants – the PVI sites focused entirely on government grants.  
 19 See supra notes 47-48. Similarly, of the ten grant websites captured by Federal Trade  
 20 Commission investigators and the Better Business Bureau, only two included a reference  
 21 to “private” grants in a central position – and one of those sites was Government Money  
 22 Secrets. See supra note 37.

23 Apart from the lack of foundation for PVI materials (*see* Objection, pp. 2-4), there are  
 24 several problems with the FTC’s assertion:-  
 25

26 First, the FTC’s statement that only two of the pages captured by FTC investigators  
 27 mention private grants “in a central position” would be amusing were the stakes not so serious:  
 28 As noted below, FTC investigators admitted in their depositions that they were selective in what

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<sup>22</sup> DE 026, Bauer dec., ¶ 3.

1 documents they printed or captured, the main criterion appearing to be whether it supported the  
2 FTC's allegations. *See* fn. 45. In other words, the FTC's citation to the websites it "captured"  
3 amounts to no more than, "Of the websites we chose to capture because they were favorable to  
4 the FTC, all were favorable to the FTC." Indeed, the only reason why two of them were not  
5 was because, back in 2008, an earlier investigator (Mr. Menjivar) with a different philosophy  
6 about record-keeping, printed – and kept – websites that mentioned government and private  
7 grants on their face.<sup>23</sup>

9 This same defect exists with the FTC's claim of websites "captured" by the Better  
10 Business Bureau. Again disregarding the lack of foundation for these documents (*see*  
11 Objection, p. 4), this assertion is perplexing: the only BBB testimony in this case is from its  
12 Las Vegas representative, who said that the BBB conducts no investigations; it therefore seems  
13 unlikely that it would be capturing websites.<sup>24</sup> If what the FTC really means is that, by combing  
14 through the "nearly 3,000" BBB complaint files, it was able to find and capture only a couple of  
15 websites that it liked, that ratio speaks volumes.

17 The FTC's decision to focus only on "government grant-only" sites, and not others from  
18 which purchases were made, explains the undisputed fact that – out of all of the brokers with  
19 whom IWorks contracted over the years, the FTC singled out and sought websites from only  
20 one of them, PVI. Investigator Jacobsen admits that there were "reasons" for this, but that he  
21 "can't recall" what they were.<sup>25</sup>

23 Regardless of whether this type of outcome-oriented investigation by a powerful  
24  
25

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26 <sup>23</sup> Exh. 1800, Menjivar depo., p. 51:2-12; 56:14-57:6, citing DE 26-0, Exh. 36, Att. B, pp. 1-3.

27 <sup>24</sup> Exh. 1809, Mettler depo., pp. 19:9-20:17; 62-73.

28 <sup>25</sup> Exh. 1801, Jacobsen depo., pp. 216:4-219:24.

1 governmental agency is appropriate, it does nothing to negate the existence of issues of fact.  
 2 Although the number would have to be determined at trial, there is evidence that many, if not  
 3 most, grant sales were from unchallenged websites (*i.e.*, sites that included “private” grants).

4 This evidence includes:

- 5 • As noted, in 2008, FTC investigator Menjivar visited websites advertising  
 6 IWorks’ grant product. Those pages promoted both government and private grants.<sup>26</sup>  
 7
- 8 • Although the FTC has not laid foundation for them (*see* Objection, pp. 2-4), web  
 9 pages that the FTC itself gave its expert and used as exhibits say “private and federal grants”.<sup>27</sup>  
 10
- 11 • Several consumers sent FTC investigator Tyndall the grant CD that they  
 12 received, which on its face was titled “Your Federal and Private Grant CD”.<sup>28</sup>
- 13 • If the FTC is permitted to use privileged documents in this case (*see* pp. 55-60,  
 14 *infra*), numerous other examples of government “and private” sites are available.<sup>29</sup>

15 Because the FTC does not challenge sales from government+private sites, and has not  
 16 established as a matter of law the absence of such sales (and in fact, the contrary is true), the  
 17 FTC’s motion must be denied. It must also be denied for another, perhaps more fundamental  
 18 reason: The use of the word “government” on a grant website did not matter to consumers. The  
 19 grant consumers in this case testified – and told investigator Tyndall – that they did not care  
 20  
 21

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22  
 23 <sup>26</sup> Exh. 1800, Menjivar depo., pp. 51:2-12; 56:14-57:6.

24 <sup>27</sup> *See, e.g.*, DE 1266-2, GR5; DE 1266-6, GR6; DE 1266-7, GR7; DE 1266-8, GR8; DE 1267-4, GR 17;  
 25 DE 1267-5, GR 18; DE 1268-2, GR 42; DE 31-3, Exh. 116; DE 31-4, Exh. 117; DE 31-5, Exh. 118; DE-  
 26 31-7, Exh. 120; DE 31-8, Exh. 121A; DE 31-9, Exh. 121B, DE 32-0, Exh. 121C; DE 32-1, Exh. 121D,  
 DE 32-3, Exh. 123A; DE 32-6, Exh. 124; DE 32-7, Exh. 125; DE 32-9, Exh. 127.

27 <sup>28</sup> DE 1241-1, Exh. 1655, Tyndall depo. pp. 105:23–106:5; 142:17-143:3.

28 <sup>29</sup> Exh. 1089: pp. 23, 179, 184; Exh. 1090: pp. 22-23, 28, 29, 37, 38, 39, 58, 71, 77, 141-142, 144, 146,  
 159, 160, 161.



1 about the source of a grant: government, private, it did not matter to consumers.<sup>30</sup>

2 The FTC Act is violated only by material misrepresentations. While the FTC sometimes  
3 argues that every statement is material (a circular proposition), that is clearly not the case when  
4 consumers say it was not. Where all evidence is to the contrary, an issue of fact obviously  
5 exists as to materiality of the reference to “government.”  
6

7 Finally, there is a problem with the FTC’s own record citation. While the FTC says that  
8 “more than 400,000” sales were made from challenged websites (not taking into account  
9 cancellations, refunds, etc.), the actual record citation says, in the column for the websites  
10 accompanying those sales, “original unknown.”<sup>31</sup>  
11

12 **1. Numerous government grants are available for personal needs.** Apart from  
13 the foregoing, even the select websites challenged by the FTC do not support the FTC’s claims.  
14 The FTC’s entire case (regarding the grant product) depends upon its mantra that “there are few,  
15 if any, government grants for personal expenses,” that no government grants are “available for  
16 personal assistance,” etc. That is simply untrue: There are billions of dollars, and thousands of  
17 government grants available and awarded to millions of individuals in the United States for  
18 personal needs, including education, home improvements, rental assistance, car repairs, medical  
19 needs, utilities, phone bills, energy savings, learning English, starting businesses in rural areas,  
20 help to individuals following a disaster, help to refinance a home mortgage, stipend for  
21  
22

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23  
24 <sup>30</sup> Exh. 1800, Menjivar depo., pp. 43:6-12; 50:7-11; 51:4-12 (websites printed off in 2008 included  
25 government and private grants); DE 1238-3, Exh 1619, Hong depo., p. 109:3-22; DE 1237-1, Exh. 1600,  
26 Bachman depo. pp. 62:7-63:1; Exh. 1804, Blohm depo., p. 45:11-20; DE 1238-4, Exh. 1620, Huffman  
27 depo., p. 42:11-23; Exh. 1810, Kizzie depo., pp. 41:18-24, 44:19-23; DE 1240-2, Exh. 1647, Miller  
28 depo., pp. 13:13, 14:19, 16:7-17; DE 1241-3, Exh. 1658, Waite depo., pp. 27:4 - 30:8; *see also* DE 1241-  
1, Exh. 1655, Tyndall depo., p. 130:17-23 (admitting that consumers told him they did not care where a  
grant came from).

<sup>31</sup> Exh. 1811, IW-14-00008 (IWorks spreadsheet responding to CID Interrogatory 14).

attendance at GED courses, grants for individuals studying or practicing the creative arts, etc.<sup>32</sup>

The only way the FTC can deny this reality is by using a technical definition of “grant” that is inconsistent with the common understanding of the word. All witnesses in the case – including consumers and the FTC’s own investigators – agree that ordinary people use the word “grant” broadly to mean money that does not have to be repaid, such as scholarships, or money saved (*e.g.*, low-interest loans), etc.<sup>33</sup>

Despite this undisputed evidence, however, the FTC insists that IWorks should have used a narrow definition that is known only to professional grant experts (and that applies *only* to federal grants).<sup>34</sup> Every one of the FTC’s factual assertions and references to opinions of Mr. Bauer, Donna Davis, John Porter, etc., all hinge upon this strained definition. (*See* FTC Mem., pp. 19-22.) But it is misleading for the FTC to say that Dr. Porter, for example, told IWorks there are no government grants for individual needs, without disclosing Dr. Porter’s explanation that all such assertions were based on the technical meaning of grant – which he agrees is quite different from the ordinary consumer’s definition.<sup>35</sup> The same is true when the FTC cites to in-

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<sup>32</sup> *E.g.*, Exh. 1808, Browning Rept., pp. 7-16; Exh. 1839, Browning depo., pp. 112:1-4.

<sup>33</sup> *E.g.*, DE 1237-1, Exh. 1600, Bachman depo. pp. 54:23-55:6 (grant would be monies given to you with no repayment required); DE 1238-3, Exh. 1619, Hong depo. pp. 67:19-68:9; 108:8-109:2 (includes subsidized loan); DE 1240-2, Exh. 1647, Miller depo., pp. 13:13-16:7 (money to help achieve her goal, including assistance or loans); Exh. 1810, Kizzie depo., pp. 44:24-45:3; pp. 51:23-52:2 (including Pell grant or other college funding); DE 1241-3, Exh. 1658, Waite depo., p. 28:4-14 (any federal assistance, including low-interest loans); *see also* Exh. 1808, Browning Rept., pp. 2-4 and Exh. 1812, Browning Rebuttal Rept., p. 2 (from interacting with more than 1,000 grantseekers, consumers construe “grant” broadly; federal government also uses broader definitions); DE 1241-1, Exh. 1655, Tyndall depo., pp. 128:10-129:2.

<sup>34</sup> The FTC says: “A federal grant is an award of financial assistance from a federal agency to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States.”

<sup>35</sup> Exh. 1803, Porter depo. pp. 72:5-13–74:8; 233:2-25; 291:8-21.

1 house counsel Mr. Gubler, who was himself referring only to the FTC's position. (*Id.*, p. 21.)

2 In an unusual twist, the FTC seeks to penalize IWorks for using the commonly  
3 understood meaning of a word instead of a hypertechnical definition – a definition so narrow  
4 that even the well-known “Pell Grant” would not count as a grant.<sup>36</sup> Words in advertisements  
5 must be judged by their ordinary meanings<sup>37</sup>, and the FTC's position is baseless.  
6

7 In its zeal to pursue IWorks, the FTC is also forced to take other positions that a  
8 factfinder could find patently unreasonable, such as: 1) Refusing to count anything that  
9 consumers in this very case were actually interested in and considered “grants”, such as  
10 scholarships, low-interest loans, utility assistance, assistance with a start-up business in a rural  
11 area, etc.; and 2) refusing to count re-grants (disposition of federal money to another entity,  
12 which then administers it) as government grants – even though the FTC's expert admits that  
13 these re-grants are and should be considered federal grants.<sup>38</sup>  
14

15 Armed with the FTC's counterintuitive definition of “grant,” investigator Tyndall ran  
16 some searches on IWorks' member site while it was still live. Unfortunately, what searches he  
17 ran is unknown, because for reasons that are undisclosed (but may be surmised), Mr. Tyndall  
18 chose to keep a record only of some of his searches.<sup>39</sup>  
19  
20

21 <sup>36</sup> DE 1237-2, Exh. 1601, Bauer depo., p. 75:10-19.

22 <sup>37</sup> *American Home Products Corp. v. FTC*, 402 F.2d 232, 236 (6th Cir. 1968) (FTC's “technical”  
23 definition of hemorrhoid was unrealistic; broader definition “is what the term means to the average  
24 person, and it is the average person with whom we are here concerned.”) By relying on this definition,  
25 the FTC is also forced to take a position that is both untenable and anti-consumer, i.e., that by definition,  
26 federal grants cannot help people with personal needs because doing so would not serve any “public  
purpose”. But any suggestion that helping individuals with education, job training, heating bills,  
accessibility, etc., does not serve a public purpose is untrue, *see* Exh. 1808, Browning Rept, p. 7.

27 <sup>38</sup> DE 1237-2, Exh. 1601, Bauer depo., pp. 68:4-69:11.

28 <sup>39</sup> DE 1241-1, Exh. 1655, Tyndall depo., pp. 70:20-71:19; 74:9-75:13.

1           What little information Mr. Tyndall can provide about his searches present cross-  
 2 examination fodder for Mr. Tyndall at trial. For example, when Mr. Tyndall's first search  
 3 produced a grant for mobility improvements for disabled veterans (clearly a personal need), he  
 4 did not then run any additional searches for "mobility," "improvement," "disabled," "handicap,"  
 5 or "handicapped," or even "veteran."<sup>40</sup> He might have run searches for "aid" or other words, he  
 6 admits, but if so, he did not keep the results.<sup>41</sup>

8           The FTC then hired a grant expert (David Bauer) who, by his own admission, focuses on  
 9 grants for schools and has no experience with grants for individuals.<sup>42</sup> Mr. Bauer ran a few  
 10 searches on the IWorks site – unfortunately, with input on search terms from Mr. Tyndall.<sup>43</sup>  
 11 These searches included conjunctive phrases not commonly used by consumers, such as "credit  
 12 card repayment," "debt reduction," and "medical expense repayment," none of which were  
 13 mentioned by any consumers in this case.<sup>44</sup> (For unknown reasons, Mr. Tyndall did not ask Dr.  
 14 Bauer to run searches for subjects described by the consumers here; it can be inferred that Mr.  
 15 Tyndall had already run such searches and decided they were not helpful to the FTC's case.<sup>45</sup>)  
 16  
 17

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18  
 19 <sup>40</sup> *Id.*, pp. 131-133:14-23.

20 <sup>41</sup> *Id.*, pp. 141-142:15-15. This is important because, once the case began and a preliminary injunction  
 21 was entered, IWorks' servers were seized and new searches could not be run, rendering it impossible to  
 22 verify Mr. Tyndall's "investigation."

23 <sup>42</sup> DE 1237-2, Exh. 1601, Bauer depo. pp. 25:15–26-4, and DE 26-3, Ex. 40, Att. A (Bauer Resume).

24 <sup>43</sup> DE 1237-2, Exh. 1601, Bauer depo., pp. 63:8-64:7.

25 <sup>44</sup> DE 1237-2, Exh. 1601, Bauer dec, ¶ 38a. Had Mr. Bauer run searches more consistent with  
 26 consumers' described interests, he would have found, for example, under "medical," 4,399 grants;  
 "healthcare," 284; "housing," 1,110; "utilities," 18; and "bills," 46. DE 097, Payne dec. ¶ 47.

27 <sup>45</sup> This inference is not speculative. While Mr. Tyndall offers no explanation for why he chose not to  
 28 retain search results on the grant site and other important aspects of his investigation, DE 1241-1, Exh.  
 1655, Tyndall depo., pp. 70:20-71:19; pp. 74:9-75:13, his colleague Mr. Jacobsen openly admits that he  
 felt no reason to retain, or provide to the court, evidence that he uncovered that was not favorable to the

1           **2. “Likelihood” of obtaining “government grants for personal expenses.”** The  
 2 FTC alleges that “IWorks, Inc. marketed its grant product through websites, blogs, and emails –  
 3 all designed to give consumers the impression that they were *likely* to get a government grant  
 4 for personal expenses if they signed up for the grant CD.” (FTC Mem., p. 10:16; emphasis  
 5 added.) The FTC’s only cite for that statement: An admission by IWorks that “some of the  
 6 IWorks, Inc. grant websites represent that government grants *may* be available to pay certain  
 7 personal needs.” *Id.* (Emphasis added.)

9           “May” is not “likely.” Nor, for that matter, are “needs” necessarily “expenses.” But no  
 10 matter how many times the FTC says – while citing the same few websites over and over – that  
 11 websites were “rife” with “bold statements” that “government grants are available for personal  
 12 needs,” two facts remain true: First, such statements are true (*see* pp. 11-14). Second, even  
 13 early sites criticized by the FTC (for which foundation is lacking; *see* Objection at pp. 2-4) do  
 14 not support the FTC’s allegations: the sites say that purchasers “may qualify” for free  
 15 government funding, the government allocates billions each year to American citizens, that the  
 16 grant site included information (at that time) about more than 1,500 government grants, etc.  
 17 (FTC Mem., pp. 15-17.) Those statements are true, and do not represent the likelihood of an  
 18 individual purchaser qualifying. (Indeed, IWorks did not know individuals’ circumstances or  
 19 interests.) *Id.*

22           In any event, except for the handful of examples acknowledged above, the FTC  
 23 produces no sites that say what the FTC wishes they said; the sites state, truthfully, that a  
 24

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27           FTC. Exh. 1801, Jacobsen depo. pp. 78-80, 85, 144:15-20; 147:1-148:10; 165:2-15; 178:2-24; 189:7-  
 28 191:25; 233:9-16.

1 purchaser may qualify.<sup>46</sup> Absent such evidence, the FTC relies heavily on Grant-A-Day  
 2 testimonials for this and other claims (*e.g.*, FTC Mem., pp. 10-15), which is meritless – as  
 3 discussed below, such testimonials clearly indicated what they represented. They were an  
 4 opportunity for members to win something; they did not purport to address the likelihood of  
 5 getting a government grant.  
 6

7 **3. The Grant-A-Day Testimonials were substantiated and not misleading.** In  
 8 Count VI, IWorks alleges that IWorks misled consumers into believing that they were likely to  
 9 obtain grants like the ones found in testimonials. (FTC Mem., pp. 16-18.) The FTC does not  
 10 dispute that most of the testimonial it researched were, in fact truthful recipients of the “Grant-  
 11 A-Day” program.<sup>47</sup> That program was established as a benefit to members of the IWorks grant  
 12 site, developed through a strategic partnership with a local non-profit organization, New  
 13 Frontiers for Families. IWorks customers who purchased a grant membership were eligible to  
 14 apply for a grant from the Grant-A-Day Program, and given access to an online application. As  
 15 the name suggests, a grant recipient was selected every day.<sup>48</sup>  
 16  
 17

18 From August 2007 to January 2010, the Grant-A-Day program awarded 836 different  
 19 grants totaling over \$700,000. These grants provided critical resources to struggling families  
 20 and the elderly. For example, grants were awarded to help a disabled man pay for  
 21 chemotherapy (Grant No. 332); to help struggling families purchase heating oil (Grant Nos.  
 22 442, 830), avoid foreclosure on their homes (Grant Nos. 81, 100, 133, 134, 144, 146, 314, 315,  
 23  
 24

---

25 <sup>46</sup> The FTC’s memorandum, again, is challenging (and citing to) only those few sites that mentioned  
 26 exclusively government grants, not those that also included private grants.

27 <sup>47</sup> The only testimonial mentioned by a consumer in this case was an image of a person indicating that  
 28 grants (scholarships) were available for college. DE 1238-3, Exh. 1619, Hong depo. pp. 80:20-25.

<sup>48</sup> DE 097, Payne dec., ¶ 15.

322 etc.) and pay medical bills (Grant Nos. 33, 35, 45, 60, 61, 65, 510, 511, 516, 585, 601, etc.); to fund a crisis center for battered women (Grant Recipient No. 13); and to help a single mother of three children to provide children's beds, stove and furniture (Grant Recipient No. 32).<sup>49</sup>

The FTC dismisses this valuable program by claiming that only .04% of IWorks site members received Grant-A-Day awards. This calculation is unsupported: The FTC appears to be using all purchasers as a denominator, regardless of whether they canceled during the trial period or ever applied for Grant-A-Day.<sup>50</sup> Moreover, Grant-A-Day testimonials typically said "Grant-A-Day," explained that the grants were only given to "one member" per day, and made clear that they were a selling point.<sup>51</sup> For example:

**Exclusive to our Members: The Grant-A-Day Program!**

This amazing program delivers a grant to one of our members EVERY DAY! We're the only Grant program that can do this. As a member of our site you are automatically eligible for the **Grant-A-Day™** program.

These are just some of the people we've been able to help. They're regular people just like you whom we've helped get money for bills, mortgages, tuition, home repairs and a variety of personal needs.<sup>52</sup>

Another landing page touted, "We guarantee at least one member of the Grant Search Assistant™ program will be awarded a personal needs grant every single day."<sup>53</sup>

There are numerous issues of fact as to the FTC's allegations about testimonials (which,

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<sup>49</sup> DE 097, Payne dec, ¶ 16.

<sup>50</sup> If the FTC is going to assume that 100 percent of membership purchasers applied for Grant-A-Day, then it must also assume that 100 percent of membership read and understood the Grant-A-Day Program's provisions.

<sup>51</sup> DE 097, Payne dec, ¶ 16.

<sup>52</sup> *Id.*, exh. 5.

<sup>53</sup> *Id.*, exh. 4.

notably, are not supported by a single consumer in the case). Furthermore, IWorks made reasonable efforts to police the use of testimonials by its brokers<sup>54</sup>, raising additional issues of fact. *See* pp. 40-49, *infra* (addressing (non)liability for broker websites).

**II. THE FTC HAS NOT ESTABLISHED THE ABSENCE OF ISSUES OF MATERIAL FACT ON COUNT III (“Google Adwords/Adsense” products)**

IWorks offered instructional programs to generate income through advertising in connection with search engines such as Google (collectively, the “Adwords” programs). This program taught customers to create ads using AdWords and AdSense, provided guidance on ad placement, gave tips on driving online traffic through their websites to other sites, and offered similar advice.<sup>55</sup> (AdWords and Adsense were, and are, advertising programs operated through Google; for example, AdWords pays commissions to web publishers in exchange for allowing Google to run ads for its advertising clients on those sites.)

The content for the Adwords program sold by IWorks was developed by Steven Holdaway, a search engine marketing expert who is certified as a Google advertising professional, a Yahoo search marketing ambassador, and is the author of *G Money Pro* and *G Money Pro 2: How to Get Rich With Google Adwords* (G Money Pro 2010).<sup>56</sup>

IWorks purchased the rights to host Mr. Holdaway’s system on its member site, which Mr. Holdaway regularly updated. Customers who paid the monthly subscription rate for web access received not only the program but also live customer support. In total, IWorks paid Mr.

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<sup>54</sup> *See, e.g.*, B. Payne email to all marketing partners, April 29, 2008 at Ex. 61 (“Testimonials must be verified and approved”).

<sup>55</sup> DE 097, Payne dec. ¶ 20.

<sup>56</sup> Exh. 1813, Holdaway Rept., pp. 1-2.



1 Holdaway \$210,000.<sup>57</sup>

2 Interestingly, the FTC's memorandum does not cite a single consumer who claims to  
3 have seen one of the challenged AdWords ads, who purchased from one of the challenged sites,  
4 or who is complaining about IWorks' AdWords product. Although the FTC claims it has a  
5 relaxed burden of causation (*but see* pp. 61-65), the defendants are unaware of any FTC cases in  
6 which the FTC has failed to introduced evidence from a *single* consumer of the product.  
7

8 This evidentiary gap is especially troubling because most of the program landing pages  
9 that were presented to consumers made no specific earnings claims at all.<sup>58</sup> The few ads that  
10 actually did state earning potential are not known, as the "screenshots" the FTC has produced  
11 lack the foundation to purport to be accurate representations of what was ever produced by  
12 IWorks or its brokers.<sup>59</sup>  
13

14 Assuming that the screenshots were accurate representations of the websites, there are  
15 two reasons that even the highest representations of income made on the screenshots were not  
16 misleading. First, the FTC's record citation (fn 6) lacks foundation: It is a statement made by  
17 FTC investigator Tyndall, who claims no experience with the online marketing tools provided  
18 by Google AdWords, and no foundation to opine whether the statements made regarding the  
19 AdWords programs were true. Second, IWorks has detailed – and uncontroverted – testimony  
20 that the challenged representations were in fact true. For example, Mr. Holdaway testified that:  
21

- 22 • He had substantial training and expertise in working with Google
- 23
- 24
- 25

---

26 <sup>57</sup> DE 097, Payne, ¶ 21; DE 108, Exh 22, Mar. 22, 2007 email.

27 <sup>58</sup> DE Payne, ¶19; DE109, Exh 23.

28 <sup>59</sup> The problem with the images begins—and ends—with FTC investigator Tyndall. In both his declaration submitted to support the FTC's motion and in his original declaration supporting the motion

1 AdWords. This included being a Certified Google Advertising Professional, a Google  
2 AdWords Certified Partner and a Level 9 Official Google.com support user;

3 • In high school, he made about \$150 per week using Google AdWords.  
4 This increased to \$3,000-\$5,000 per week in college. After college, he realized profits of  
5 between \$30,000-\$90,000 per month;

6 • He distilled his principle of success into a handbook, and later into a  
7 program marketed by IWorks under various iterations, all deemed by the FTC as the “make-  
8 money” program;

9 • Representations of income ranging from \$200-\$943 per day were  
10 reasonable, based on his experience and IWorks’ years-long interaction with users of the  
11 product;

12 • The results claimed in the solicitations were achievable by any individual  
13 capable of surfing and making a purchase on the internet;

14 • “Anyone” could achieve such results, that is, it is “within the expectation  
15 of a reasonable consumer to make the amount of revenue stated within a reasonable time”;

16 • The term “Start Making Money Today” is accurate, as Holdaway had  
17 customers report making a profit the very first day.<sup>60</sup>

18 Mr. Holdaway’s testimony underscores the value of the IWorks AdWords products and  
19 the accuracy of the representations concerning them. Moreover, Chris Cox, an FTC witness and  
20 IWorks ex-employee, testified that he was familiar with the product, and that it was a good one

21  
22  
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24  
25  
26 for preliminary injunction, Tyndall simply cites to IWorks sales numbers without properly associating  
27 those numbers with any actual website viewed by the public.

28 <sup>60</sup> See DepEx 1401, Holdaway Report, pp. 1-8; Exh 1814, Holdaway Depo., pp. 36:14-37:24.

1 that consumers could make money with.<sup>61</sup>

2 Representations regarding the programs' potential were thus both substantiated and true.  
3 Tellingly, the FTC has no evidence to the contrary. If the FTC could not locate an unhappy  
4 AdWords purchaser, surely it could have found an expert to rebut Mr. Holdaway's testimony –  
5 indeed, running a search for AdWords on Amazon.com produces *20 pages* of results.  
6

7 Lacking any substantive basis to challenge Mr. Holdaway and the technical feasibility  
8 and reasonability of the representations made in the alleged websites, the FTC instead embraces  
9 a red herring and attacks testimonials. Significantly, the FTC does not claim that the  
10 testimonials are false, but rather, implicitly, that there are too few of them. (*See* FTC Mem., pp.  
11 27-28.) But testimonials are not required to vouch the truthfulness of marketing; they are  
12 simply one of many marketing tools.  
13

14 Having failed to rebut Mr. Holdaway's testimony, the FTC finishes its unmerited attack  
15 with a miscitation of Mr. Holdaway's testimony, claiming that he could not "identify a single  
16 individual, other than himself, who made the type of earnings advertised on IWorks' sites."  
17 (FTC Mem., p. 21.) That is not what Mr. Holdaway said. He actually stated that he did not  
18 collate all of the information from those individuals who communicated with him, did not form  
19 relationships with them, and could not remember specific individuals' names. Mr. Holdaway  
20 explained that he had visualized and formed his conclusions based on the numerous interactions  
21 he had with users of the product, even though he could not recall in the deposition the exact  
22 identity of the individuals with whom he communicated.<sup>62</sup> If the FTC does not believe Mr.  
23 Holdaway's testimony that he interacted with hundreds of consumers, that is an issue that will  
24  
25  
26

27 <sup>61</sup> DE 1237-5, Exh. 1608, Cox depo at 59:15–60:7; 140:11-15.

28 <sup>62</sup> Exh. 1814, Holdaway depo., pp. 168:20-169:25, p. 204:2-14.

1 need to be tried – but summary judgment is inappropriate.

### 2 **III. COUNTS IV, V, and IX**

3 Counts IV, V, and IX allege “deceptive” and “unfair” practices based on alleged non-  
4 disclosure or inadequate disclosure of offer terms.<sup>63</sup>

5  
6 Analysis of this issue must begin with two basic concepts: First, the FTC Act does not  
7 override the general freedom of contract, or the long-recognized duty to read the terms of a  
8 contract. Rather, the FTC Act is implicated only by the exception to this rule, when a person  
9 has been prevented, by “some fraudulent trick or device,” from reading them.<sup>64</sup>

10  
11 The FTC began this case by claiming that order pages for IWorks products (the pages on  
12 which consumers enter their credit card information) did not disclose the terms of the offers,  
13 particularly monthly charges. DE 043, p. 25. That contention has been debunked (or, at a  
14 minimum, an issue of fact exists).<sup>65</sup>

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15  
16  
17 <sup>63</sup> Counts IV and V claim “deception” based on disclosure of continuity/negative option programs for  
18 IWorks products sold on brokers’ websites. Count IX alleges “unfair” practices involving IWorks  
19 products that third-parties sold as upsells on their websites. The claims are similar, except that, with  
20 “unfair” practices, the FTC must show not only that the consumer acted reasonably, but that the alleged  
21 harm could not be avoided.

22 <sup>64</sup> *Ford Motor Co. v. Pearson*, 40 F.2d 858, 867-68 (9th Cir. 1930) (“It is a fundamental rule that a  
23 person in possession of all his faculties, who signs an instrument for the purpose of giving effect thereto,  
24 cannot evade the consequences of the document by merely neglecting to read it. If his signature is  
25 secured by some fraudulent trick or device as to the context thereof, which prevents him from reading  
26 the document he signs, he may by proper action avoid the consequences which would otherwise result  
27 from such instrument.”)

28 <sup>65</sup> An FTC investigator made “undercover buys,” and in each instance the order page had clear  
disclosures. *See* Exh. 1801, Jacobsen depo., pp. 108-123; 126:2-25; 127:23; 134-148, and Exhs. 964-  
968; *see also* DE 1240-1, Exh 1642, Marker depo., pp. 265:25-267:14 (order pages were usually  
compliant); DE 1237-5, Exh. 1608, Cox depo., pp. 29:13-25; 89:25–90:22; 89:23–91:6 (order pages had  
disclosures; could almost always pull up actual order pages and show consumers the disclosures), and  
Exh. 1266 (most order pages were similar to this page); Exh. 1815, Good Report, p. 21 (96 of 100 order  
pages provided by FTC had disclosures); *See e.g.*, DE 1237-6, Exh. 1609, DeWitt depo. pp. 31:17-32:24;  
50:5-17, 24 (went back to website shortly after purchase and saw that disclosures were there); DE 1240-  
2, Exh. 1647, Miller depo., p. 67:1-17 (knew she had to read (and did read) and accept the terms and

1 That leaves the FTC with two weaker theories: 1) that the disclosures should have been  
 2 on the landing page (the first page of a website on which a visitor “lands”); or 2) that the  
 3 disclosures on the order page were inadequate. Before addressing these contentions, however,  
 4 the threshold issue of notice must be addressed.  
 5

6 **1. Notice of the allegedly prohibited conduct was not provided.** Before civil or  
 7 criminal liability may be imposed upon a defendant, as a matter of due process, a government  
 8 agency must first show that the defendant was on “fair notice of what conduct is prohibited,”  
 9 *i.e.*, that “a person of ordinary intelligence [has] a reasonable opportunity to know what is  
 10 prohibited so that he may act accordingly.”<sup>66</sup>  
 11

12 Both the FTC’s and the defendants’ experts have confirmed, in different ways, that a  
 13 reasonably prudent vendor would not have had fair notice of what conduct was prohibited with  
 14 respect to the content or placement of negative option disclosures, both before and after the FTC  
 15 publication “DotCom Disclosures” was issued in 2009. Defendants’ expert Jeffrey Bloom  
 16 opines that prohibited conduct was not discernable prior to 2009, and that DotCom Disclosures  
 17 did not shed any badly needed light on the subject.<sup>67</sup> The FTC’s expert also confirms that a  
 18 reasonable vendor could not, and cannot, discern what is required or not required for effective  
 19 disclosures – at least not without conducting user studies and empirical evaluations, the very  
 20  
 21  
 22

23 conditions before she clicked on the submit button); DE 1241-3, Exh. 1658, Waite depo., p. 37:2-14  
 24 (believes disclosures were likely there); DE 25-6, Exh. 35 (IWorks website reviews noting appropriate  
 25 disclosures on order pages); Exh. 1801, Jacobsen depo., pp. 189:13-190:16 (acknowledging IWorks  
 website reviews noting appropriate disclosures).

26 <sup>66</sup> See *Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm’n*, 142 F.3d 1179, 1182 (9th  
 27 Cir. 1998); *U.S. v. Approximately 64695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008);  
*General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

28 <sup>67</sup> See Exh. 1816, Bloom Rept., pp. 3, 6, 7 and Exh. 1817, Bloom depo., pp. 35:13-22, 50:13-53:14.

1 need for which confirms the lack of notice.<sup>68</sup>

2       **2. The law does not require disclosures on landing pages.** Faced with evidence  
3 that order pages for IWorks products nearly always had disclosures, the FTC now argues that  
4 the disclosures should have appeared on website landing pages. Although disclosures did  
5 appear on about half of the landing pages<sup>69</sup>, any contention that it was legally required is  
6 factually and legally insupportable: The FTC's own expert, Dr. Good, stated in a 2007 FTC-  
7 sponsored conference that disclosures should be on the page where consumers enter their  
8 financial information (*i.e.*, the order page); putting disclosures before then is too early for  
9 consumers.<sup>70</sup> The defendants' expert, Jeffrey Bloom, agrees: placing negative option  
10 disclosures on a landing page would be contrary to industry norms and consumer expectations.<sup>71</sup>

13       **3. Disclosures on the order pages were not deceptive.** With respect to the  
14 adequacy of disclosures on a website, it bears reminding that the FTC Act prohibits only  
15 *deceptive* advertising; it does not prohibit could-be-improved, or could-be-more-prominent, or  
16 could-be-bigger, or could-be-a-different-color ads. If disclosures are there, and are not (literally  
17 or figuratively) concealed, vendors are entitled to assume that consumers will read them.

19       This principle is illustrated by *In re Vistaprint Corp Mktg. & Sales Practices Litig.*,

21 \_\_\_\_\_  
22 <sup>68</sup> Exh. 1421, Good 2007 remarks. Dr. Good admits that, even applying his "best practices" approach,  
23 "it is a difficult question" of how to reach the ideal situation of notice; in 2007, he urged the government  
to "establish[] guidelines for notice construction and implementation based on empirical research[.]" *Id.*,  
p. 3.

24 <sup>69</sup> DE 1239-7, Exh.1638, Kramm depo., p. 106:1-20; DE 1240-1, Exh. 1642, Marker depo., pp. 265:25-  
25 267:14.

26 <sup>70</sup> Exh. 1421, Good 2007 remarks, pp. 3-4. Dr. Good admits that, even applying his "best practices"  
approach, "it is a difficult question" of how to reach the ideal situation of notice.

27 <sup>71</sup> Exh. 1816, Bloom Report, pp. 5-6 (explaining why placing negative continuity disclosures on landing  
28 page would be unreasonable, inconsistent with visitor expectations, and inconsistent with e-commerce  
standards), and p. 8.

1 MDL 4:08-MD-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009) aff'd sub nom. *Bott v.*  
2 *Vistaprint USA Inc.*, 392 F. App'x 327 (5th Cir. 2010).

3 In *VistaPrint*, consumers who made an initial purchase were directed to a page with a  
4 prominent offer for a \$10 rebate. A boxed area provided space for consumers to enter their  
5 email address, in some cases, to answer two or three “survey” questions. The box also included  
6 a large “YES” button and a reference to “Offer Details” elsewhere on the page, *e.g.*, “By  
7 clicking ‘Yes’ I have read and agree to the Offer Details displayed to the left and authorize  
8 VistaPrint to securely transfer my name, address and credit card information to VistaPrint  
9 Rewards, a service provider of VistaPrint.” Only by reading the “Offer Details” outside and  
10 adjacent to the boxed did area did the VistaPrint consumer learn that clicking “Yes” would  
11 enroll her in a negative option plan—a 30-day free trial membership, with fees of \$14.95 per  
12 month thereafter. (An 8 ½ x 11” image of the VistaPrint website follows on the next page.)


13 As with iWorks’s upsell enrollment process, VistaPrint consumers were not required to  
14 re-enter their credit card numbers for the additional item. Nor were the upsells the most  
15 prominent feature of the enrollment page—the \$10 rebate offer and, on some pages, survey  
16 questionnaires, occupied the main content. Some consumers filed suit and multi-district class  
17 actions were certified on behalf of thousands of VistaPrint’s alleged victims. *Id.*

18 The forum state had adopted the FTC Act as its standard for deceptive practices and,  
19 without deciding whether they would be binding, the trial court compared the FTC’s “DotCom  
20 Disclosures” to the website. Among other things, the plaintiffs complained that the terms of the  
21 offer were to the left of instead of immediately above the submit button, were smaller print than  
22 other text on the page, were less prominent than other features on the website, etc. The district  
23  
24  
25  
26  
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28





**VistaPrint  
Rewards**





A special thank you with your purchase from  VistaPrint

Thank You... please complete your survey and claim your reward —

**\$10.00 CASH BACK ON YOUR ORDER TODAY!**

Thank you for your purchase from VistaPrint today! Complete your 2006 Consumer Survey and VistaPrint Rewards™ registration to claim your \$10.00 Cash Back Award on the VistaPrint.com purchase you made today ([Click here for \\$10.00 Cash Back details](#)). Plus, get all the money saving benefits of VistaPrint Rewards, a premier entertainment savings program!

#### MEMBER REWARDS

-  **Shopping and entertainment** - 20% Savings on gift cards<sup>1</sup> purchased through VistaPrint Rewards for leading retailers such as Barnes & Noble®, BLOCKBUSTER®, Circuit City® and many others — for a savings of up to \$1,000 per year. [Benefit Details](#)
-  **Dining** - 20% savings on gift cards/certificates<sup>1</sup> purchased through VistaPrint Rewards for popular family restaurants, including Red Lobster®, Olive Garden® and more — for a savings of up to \$160 per year. [Benefit Details](#)
-  **Movie savings** - Movie tickets for \$5.50. You may purchase up to 100 tickets annually through VistaPrint Rewards for many popular theaters. (For tickets redeemed in Manhattan, NY, it's up to \$2.50 extra at the door.) [Benefit Details](#)
-  **Online Travel Agency** - Up to 30% off hotel stays and car rentals, hundreds of dollars in airfare savings plus other great vacation deals through our exclusive Online Travel Agency<sup>1</sup>.

#### Offer Details:

Simply click "Yes" to activate your trial membership and take advantage of the great savings that VistaPrint Rewards has to offer plus claim your \$10.00 Cash Back. The membership fee of \$14.95 per month will be charged by VistaPrint Rewards to the credit card you used today with VistaPrint after the 30-day FREE trial and then automatically charged each month at the then-current monthly membership fee so long as you remain a member. Of course, you can call toll-free at 1-888-243-6185 and speak to a VistaPrint Rewards member representative within the first 30 days to cancel — you will have paid nothing and owe nothing. Please note that by agreeing to these Offer Details you are authorizing VistaPrint to securely transfer your name, address and credit card information to VistaPrint Rewards, a service provider of VistaPrint. No matter what, the FREE \$10.00 Cash Back is yours to claim! Remember, you can call to cancel at any time and you will no longer be charged.

**\$10.00 CASH  
BACK!**

#### 2006 Member Survey

Please complete your Survey below. Click on the answers you want and complete your information to claim your \$10.00 Cash Back just for trying VistaPrint Rewards FREE for 30 days.

How do you make most of your travel-related purchases?

☒ Online ☐ Offline ☐ Both

Do you dine out at least once a month?

☒ Yes ☐ No ☐ Sometimes

Do you go to the movies at least once a month?

☒ Yes ☐ No ☐ Sometimes

Please enter the e-mail address you used to order from VistaPrint:

By clicking "Yes" I have read and agree to the Offer Details displayed to the left and authorize VistaPrint to securely transfer my name, address and credit card information to VistaPrint Rewards, a service provider of VistaPrint.

E-Mail

Confirm E-Mail

**Yes**

Click ONCE and wait.

[No Thanks](#)

 **VistaPrint  
Rewards**

<sup>1</sup> Participating vendors are member sponsors, co-sponsors or affiliates of VistaPrint Rewards. Gift card/certificate savings are an exclusive offer of VistaPrint Rewards and are valid only on gift card/certificate purchases purchased through VistaPrint Rewards. Please see back of gift card/certificate for terms and conditions of use. All vendor trademarks and copyrights remain the property of the individual vendor. VistaPrint Rewards uses vendor names, logos and any other vendor material by permission of each vendor. Please visit the VistaPrint Rewards website or call Member Savings for complete terms and conditions related to participating vendors.

<sup>2</sup> Barnes & Noble is not a sponsor or co-sponsor of this promotion. Please see back of gift card for terms and conditions of use. Barnes & Noble is not liable for any alleged or actual claims related to this offer.

<sup>3</sup> All travel is arranged by World Choice Travel. World Choice Travel is registered as a California Seller of Travel (Registration No. 2056072-00). Registration as a seller of travel does not constitute approval by the State of California; Nevada Seller of Travel (Registration No. 2004-0114); Florida Seller of Travel (Registration No. ST342000) and Washington Seller of Travel (Registration No. 502 119 764).

Confidential & Privileged:  
Non-Public Information

[Privacy Policy](#) | [Terms and Conditions](#)

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**EXHIBIT 34**



1 court held that the disclosures satisfied FTC Act requirements, and on *de novo* review the Fifth  
 2 Circuit agreed. As stated by the district court:

3 “[A] a consumer may not decline to read clear and conspicuous terms that are  
 4 provided “on the same webpage in close proximity to the location where the  
 5 consumer indicates his agreement to those terms and then claim that the  
 6 webpage, which the consumer has failed to read, is deceptive.”

7 *VistaPrint, supra*; see also *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236-37 (E.D. Pa.  
 8 2007) (electronic agreement enforceable where sufficient notice afforded); *Barnett v. Network*  
 9 *Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App. 2001) (electronic agreement enforceable where  
 10 plaintiff had an “adequate opportunity to read and understand” the agreement); *Feldman v.*  
 11 *Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (“[F]ailure to read an enforceable  
 12 clickwrap agreement . . . will not excuse compliance with its terms.”); *Burcham v. Expedia,*  
 13 *Inc.*, 4:07CV1963 CDP, 2009 WL 586513, at \*2 (E.D. Mo. Mar. 6, 2009) (noting that failure to  
 14 read an online agreement “will not excuse compliance with its terms.”).

15  
 16 The FTC’s *own* examples – those it provided to Dr. Good and obtained through  
 17 “undercover buys,” show that the disclosures were not deceptive. See, e.g., fn. 27, 65. (In the  
 18 real world, of course, the text would be larger and viewed on a computer screen wider than 8-  
 19 1/2 inches.) In all of these examples, the negative option disclosures were displayed in close  
 20 proximity to the submit button, and usually within the same boxed area as the submit button and  
 21 order information. (In virtually all other instances, the disclosures were directly adjacent to it.)<sup>72</sup>

22 The disclosures generally included (i) the fact of the trial program enrollment, (ii) the length of  
 23

24  
 25  
 26 <sup>72</sup> The FTC’s own “DotCom Disclosures” state that the terms need only be “in proximity to” the submit  
 27 button. See Exh. 1818. The FTC appears to now be attempting to replace the phrase “in proximity to” –  
 28 upon which IWorks and other defendants relied – with the words “immediately above.” That is unfair –  
 if the FTC intended “immediately above,” why didn’t it say that? Allowing the FTC to retroactively  
 rewrite its own guidelines is the antithesis of providing notice of prohibited conduct.

1 trial period, (iii) the fact that the consumer would be charged “thereafter” if she chose not to  
2 cancel, (iv) the amount of the charges, (v) the fact that the charges were monthly, and (vi) the  
3 fact that the charges would be billed to the same credit/debit card.

4  
5 The disclosures were there, are in plain language, and a reasonable consumer cannot  
6 decline to read them and then complain that the website was deceptive. (Of course, in this  
7 litigation, there are few, if any, consumers actually making such a complaint.)

8 The same is true of disclosures challenged in Count IX, those dealing with IWorks  
9 products sold on third-party websites. While there might have been isolated incidents in which  
10 disclosures did not meet IWorks’ standards, in the vast majority of instances when a product  
11 was paired with an upsell, the order page’s terms and disclosures identified (i) the name of the  
12 upsell program, (ii) the length of trial period, (iii) the fact that the consumer would be charged  
13 “thereafter” if he chose “not to cancel,” (iv) the amount of the charges, (v) the fact that the  
14 charges were monthly, and (vi) the fact that the charges would be billed to the same credit or  
15 debit card used for the shipping and handling charge. And the upsell programs were highlighted  
16 in other ways. The order pages contained prominent call-out boxes with the names and logos for  
17 the upsell programs and a brief one-to-two-paragraph description. In many cases, these call-out  
18 boxes repeated the length of the trial and the price of the membership.<sup>73</sup>

19  
20  
21 **4. Other evidence suggests that the disclosures were adequate.**

22 **a. Cancellation rates:** A high percentage of purchasers (over 25% overall)  
23 canceled their memberships during the trial period. As explained by the defendants’ expert, this  
24  
25  
26  
27

28 <sup>73</sup> The FTC cannot show as a matter of law that the alleged harm was unavoidable by consumers.

figure extrapolates into a very high likelihood that a majority of others saw the disclosures.<sup>74</sup> Indeed, the percentage of purchasers who cancelled their upsell programs during the trial period was 29.1%, *higher* than the in-trial cancellation rate for the core (non-upsell) programs.<sup>75</sup> The upsells were not secretly buried in the offer terms.

**b. FTC witness Chris Cox:** Mr. Cox also confirms high cancellation rates (up to 80%) during trial periods, indicating to him that people saw the disclosures. He testified that, while he was in customer service, customers called in seeking extensions of their trial periods, called in stating they had used the site and were willing to pay but were now calling to cancel because they were done; and called in admitting that they knew about the trial deadline but simply forgot to call.<sup>76</sup>

**c. Chargeback rates:** The FTC has argued that allegedly high chargeback rates are evidence of nondisclosure. While that assertion is factually inaccurate – *see* pp. 50-53, *infra* – if the FTC’s own argument is applied, then the converse is also true. *See id.*

**d. Adverse inferences:** IWorks will be entitled to seek certain adverse inferences at trial:

**i. Camtasia videos.** The FTC recorded five “undercover buys” using software called Camtasia that makes video of what was shown on screen. This would have shown how the order page looked, how the disclosures appeared on a live screen, the size of the FTC’s screen, where the so-called “fold” was, etc. The FTC did not disclose this video in

---

<sup>74</sup> DE 1262-1, Exh. 1426, Vigil Rept., pp. 10-17. Of course, there were consumers who complained that they did not understand the disclosures, but some high number of complaints was inevitable in light of the sales volume, no matter how clear the disclosures were.

<sup>75</sup> *Id.*, pp. 11-12.

<sup>76</sup> DE 1237-5, Exh. 1608, Cox depo., pp.37:22-38:18; 86:14-87:7.

its Initial Disclosures, thus indicating that the video did not support its claims (*see* F.R.Civ.P. 26(a)(1)(A)(ii).) In July 2013, in the middle of the deposition of FTC investigator Jacobsen, the FTC disclosed for the first time that Mr. Jacobsen had made these Camtasia recordings and that the FTC had irretrievably “lost” them.<sup>77</sup> It is a reasonable inference, both from the FTC’s nondisclosure of these Camtasia videos and its failure to preserve them, that the videos would have been favorable to IWorks.

**ii. Modified copies.** In reproducing web sites, the FTC shrank the pages with a program called “snag-it,” rendering them less legible, “blurry,” etc.<sup>78</sup> This is a serious misstep in a case where the appearance of such pages is highly relevant. These pages can no longer be viewed in their original format; consequently, an adverse inference should be granted that the pages as originally viewed would have been favorable to IWorks.

**iii. Litigation hold.** On February 26, 2010, the FTC issued a litigation hold to IWorks. DE 020. For undisclosed reasons, however, the FTC did not issue its own internal litigation hold until nearly five months later, July 22, 2010.<sup>79</sup> In the interim, FTC personnel failed to preserve information and documents, such as search results, etc.

**iv. Failure to ensure consumer preservation of documents.** FTC investigator Tyndall did not ask consumers to check their browser histories to pull up the actual websites they had visited, even when contacting them shortly after a purchase. The FTC also did not tell consumer-declarants to retain documents; in one instance, because Mr. Tyndall had

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<sup>77</sup> Exh. 1801, Jacobsen depo., pp. 27:25-28:1-5, 22-24, 29:2-17.

<sup>78</sup> Exh. 1800, Menjivar depo., pp. 125:18-130:9 (admitting that FTC’s Snag-It program shrank images) and Exh. 1837, FTC-IWORKS 16169-16172 (comparing FTC’s Snag-It image vs. FTC’s printout of same page); Exh. 1801, Jacobsen depo., pp. 106:10-108:15.

1 not contacted him again for a year, the consumer threw away parts of his file that he had not  
 2 sent to Mr. Tyndall.<sup>80</sup> An adverse inference should be recognized as to the content of  
 3 consumers' unpreserved browser histories and files.

4 The FTC cites to an expert, Dr. Nathaniel Good, for the proposition that disclosures for  
 5 IWorks products were inadequate. (FTC Mem., p. 34.) However, there are several problems  
 6 with that:  
 7

8 1. Dr. Good admits that all of his opinions are from a perspective of "best  
 9 practices," *i.e.*, creation of an "ideal" website experience, a "better" interface, etc.<sup>81</sup> That is  
 10 irrelevant: not even the FTC claims that a company is required to adopt best practices. Dr.  
 11 Good also admits that, even now, it is a "difficult question" as to when a disclosure is effective.  
 12 Indeed, he says there are different schools of thought on these subjects even among  
 13 professionals ("we argue constantly").<sup>82</sup>

14 2. Proper foundation has not been laid for most of the images reviewed by Dr.  
 15 Good. *See* Objection, pp. 2-4.  
 16

17 3. Even assuming foundation, the "124 web sites" that Dr. Good claims to have  
 18 reviewed were, in fact, just a couple of dozen websites printed over and over, with only minor  
 19 changes in each version.<sup>83</sup> There is undisputed testimony that a review of 50 or fewer (or even  
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23 <sup>79</sup> Exh. 1801, Jacobsen depo., pp.72:25–73:7.

24 <sup>80</sup> DE 1238-3, Exh. 1619, Hong depo. p. 45:9-24.

25 <sup>81</sup> Exh. 1819, Good depo., pp. 26:13; 27:1-10; 78:18; 141:12 - 143:13; 156:3.

26 <sup>82</sup> *Id.*, p. 153:4-13.

27 <sup>83</sup> See DE 1266-1277, Good Exhs GR1 – GR177 (numbers are not consecutive).  
 28

1 100) websites is “not even close” to a statistically significant sample<sup>84</sup> (and, of course, it was  
2 not random – the pages were chosen by the FTC).

3 4. Dr. Good’s attempted “recreations” of images given him by the FTC were all  
4 based upon a screen resolution of 1024x768, but Dr. Good’s own cited source reveals that a  
5 significantly higher percentage (approximately 50%) of internet viewers used higher resolution  
6 at the time – which would bring more text above the outmoded “fold”.<sup>85</sup> Additionally, Dr.  
7 Good assumes that, back in 2009-2010, consumers had small screens and commonly used dual  
8 monitors; but that is not supported by consumer testimony in this case.<sup>86</sup>

9 10 5. Dr. Good bases his opinions regarding best practices on two studies by one firm,  
11 the (un)reliability of which provides substantial cross-examination fodder. The first of these  
12 studies is, by Dr. Good’s own admission, a 2001 “dinosaur” (*e.g.*, using Netscape Navigator,  
13 10-12 total participants typing in URLs because Google did not exist). A follow-up study in  
14 2011 involved another small sample and conditions that Dr. Good admits are inconsistent with  
15 real life consumer experience, and that failed to address the effect of iPhones and tablets on  
16 consumer expectations regarding scrolling.<sup>87</sup>

17 18 6. The defendants’ expert, Jeffrey Bloom, challenges Dr. Good’s methodology,  
19 analysis, and conclusions. Among other things, Mr. Bloom opines that: In the examples cited  
20 by Dr. Good, the disclosures were prominently and conspicuously displayed, especially  
21

22  
23  
24 <sup>84</sup> DE 1262-1, Exh.1426, Vigil depo., pp. 248:3-5.

25 <sup>85</sup> [www.w3counter.com/globalstats.php?year=2009&month=1](http://www.w3counter.com/globalstats.php?year=2009&month=1), cited in Exh. 1815, Good Rept., p. 15  
n.20, accessed January 15, 2014.

26 <sup>86</sup> *E.g.*, Exh. 1819, Good depo. p. 89:4-11. *See e.g.*, Exh. 1805, Cienfuegos depo., p. 28:3-8; DE 1237-6,  
27 Exh. 1609, DeWitt depo. pp. 13:23 - 14:17; Exh. 1802, Melton depo. p. 26:11-16.

28 <sup>87</sup> Exh. 1819, Good depo. pp. 53:2-8, 55:13-56:2, 56:18-57:1, 60:17-61:18, 86:1-5, 104:16–105:15.

1 compared to the common e-commerce practice of requiring a consumer to click on a separate  
 2 “terms and conditions” link; that any suggestion that disclosures should be placed on landing  
 3 pages misunderstands the purpose and consumer expectations of landing pages; and that Dr.  
 4 Good is suggesting a “shopping cart-type” standard for negative options that would “depart[]  
 5 from accepted and dominant market practice, and would not meet the ‘Clear and Conspicuous’  
 6 requirement and might very well confuse the consumer.”<sup>88</sup>

### 8 **Response to FTC’s “facts”**

9 It is not possible within page limits to respond individually to every page and line of the  
 10 FTC’s text and 271 footnotes. The defendants’ evidence in itself shows an issue of fact.  
 11 However, many of the FTC’s facts are also unsupported or unfair. For example:

13 • In several instances, the FTC conclusorily describes text on an image as “small,  
 14 hard-to-read,” “cramped,” etc. (*E.g.*, FTC Mem., pp. 31:12, 34:3, 33:1, 34:3.) However, the  
 15 FTC shrank its images, and in two different ways: first, with their “Snag-It” software, and then  
 16 to fit on 8 ½ x 11 sheets of paper.<sup>89</sup>

18 • The FTC says that, “In numerous instances, IWorks, Inc. knew from its  
 19 Compliance Team’s Website Reviews that its forced upsells were not adequately disclosed.”  
 20 (FTC Mem., p. 37:9.) The record citation for these “numerous instances” involves a single  
 21 broker, who was terminated by IWorks. More egregious, however, is that Mr. Jacobsen stated  
 22 (repeatedly) in his declaration that IWorks reviewers “acknowledge[d]” that disclosures were  
 23 inadequate, while admitting in his deposition that he knew the reviewers were applying purely  
 24

26  
 27 <sup>88</sup> Exh. 1816, Bloom Rept., pp. 10, 11, 18; Exh. 1816, Bloom depo., 35:2-12, 76:24-77:18, 92:2-96:8.

28 <sup>89</sup> See fn. 78, *supra*.

1 internal IWorks criteria, that might be “far above” what the law required.<sup>90</sup>

2       • The FTC claims that “consumer declarants confirmed that the upsells were not  
3 disclosed.” (FTC Mem., p. 31:3.) This statement is wholly unsupported: Three of the four  
4 consumers cited (Cienfuegos, Easterwood, and Melton) purchased from *GotBody.com*, which  
5 the FTC knows is not an alleged “IWorks” site.<sup>91</sup> (See fn 10.) The fourth (Ellis) testified that  
6 she remembered nothing about the website, its appearance, where she entered her information,  
7 whether there were boxes of information next to the submit button, or what the terms of the free  
8 trial were.<sup>92</sup>

9       • The FTC states several times as fact that consumers “had no choice,” or “no way  
10 to decline,” upsells. (FTC Mem., 31:7, 36:16.) But that presupposes one of the issues to be  
11 tried – whether the upsells were disclosed – which is hotly disputed.

12       • The FTC says that, of the approximately three million consumers who requested  
13 a cancellation or refund, IWorks noted that one-third of those “were ‘not aware of the monthly  
14 charges.’” (FTC Mem., p. 35:3.) That is unsupported: Mr. Tyndall admits that he does not  
15 know what the cited customer service codes meant, or the types of communications that would  
16 fall within this event code and, of course, someone seeking a refund may believe he is more  
17 likely to get one by claiming lack of knowledge than by admitting he changed his mind or was  
18 negligent.<sup>93</sup>

19       • The FTC says that “Mr. Gubler [IWorks’ in-house counsel] also testified that the  
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25 <sup>90</sup> Exh. 1801, Jacobsen depo., pp. 194:14–197:3; 199:3–202:12; 209:16–210:16; 211:25–213:12.

26 <sup>91</sup> Exh. 1821, Ellis depo., pp. 11:11 – 12:11; 23:19 – 24:9.

27 <sup>92</sup> Exh. 1805, Cienfuegos depo., pp. 20:14 – 21:12; Exh. 1820, Easterwood depo., p. 14:6-10; Exh. 1802,  
28 Melton depo., p. 13:13-16.



1 most typical complaint from I Works, Inc. customers was that they did not see the disclosure,  
 2 which meant they did not know they had purchased the product.” (FTC Mem., p. 35:12.) That  
 3 is not supported by the record cites.<sup>94</sup>

4       • The FTC says that disclosures are sometimes the “smallest font” on the page.  
 5 (FTC Mem., 34:18.) The FTC does not explain whether other text is also the same size (for  
 6 example, all text on a newspaper is “the smallest” when compared to the headline). Nor does  
 7 the FTC claim that this is an uncommon – or even improper – business practice: The  
 8 defendants invite the Court to examine any 10 random commercial websites – or 100, or 1,000 –  
 9 to determine how many, if any, present information regarding terms the same visually as other  
 10 material. The FTC’s position is inconsistent with consumer expectations.<sup>95</sup>

11       • Finally, the FTC quotes Ryan Riddle, who stated that the use of negative options  
 12 was “I Works, Inc.’s business model,” and that the company “ma[d]e our money off of the  
 13 clients that forget to call in to cancel, or simply don’t take the time to read the disclosures and  
 14 thank-you emails.” (FTC Mem., p. 32:5) To some extent, that is true: Although negative  
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19 <sup>93</sup> DE 1241-1, Exh. 1655, Tyndall depo., pp. 40:2-41-10.

20 <sup>94</sup> Mr. Gubler actually said he did not recall receiving reports about customer service on a regular basis,  
 21 wasn’t asked to review customer service calls, and did not remember what kind of complaints customer  
 22 service representatives might have been dealing with. DE 1238-1, Exh. 1617, Gubler depo., p. 260:4-22.  
 23 Another cited witness, Ms. Kramm, testified that she never heard any customer service calls, and the  
 24 “customer service” reports she purports to cite were actually the longest calls of the day, not typical  
 25 calls. (DE 1239-7, Exh.1638, Kramm depo., pp. 50:3, 273:3-274:11, 245:11; DE 1240-1, Exh. 1642,  
 26 Marker depo., pp. 246:1-249:3 (longest calls of the day). Mr. Jacobsen’s cited declaration does state  
 27 that he had access to “nearly 3000” consumer complaints – but (1) he fails to mention that this is actually  
 a very small ratio of approximately .000008; (2) he does not identify what any of the complaints said; (3)  
 the Better Business Bureau’s own representative freely admits that “people lie,” that no effort is made to  
 verify or investigate BBB complaints, and that the filing of a complaint does not mean that a consumer  
 has their facts right or acted reasonably; and (4) even Mr. Tyndall would not draft a declaration relying  
 solely on a BBB complaint. (DE 1241-1, Exh. 1655, Tyndall depo., p. 222:18-22.)

28 <sup>95</sup> See Exh. 1817, Bloom depo, pp. 20:18-21, 72:9-17. (explaining how consumer expectations are  
 formed in consideration of dominant e-commerce practices).

options are a convenience for purchasers, it is true that some consumers do forget to cancel, or disregard their duty to read disclosed terms. This is really more a complaint by the FTC about negative options as a business model, but it is a *legal* business model – the same model used by Amazon.com, Ancestry.com, Audible.com, BeenVerified.com, Dropbox.com, eFax.com, EntertainmentWeekly.com, ESPN.com, GoToMeeting.com, Hulu.com, Lifelock.com, Match.com, Merriam-Webster.com, Microsoft.com, Netflix.com, NewspaperArchive.com, Realplayer.com, RealtyTrac.com, SiriusXM.com, Spotify.com, WeatherChannel.com, WeightWatchers.com, and virtually every other subscription or membership site on the internet.

Litigation is not a substitute for regulation – if the FTC wants to ban the negative option business model, it should ask Congress or go through the rule-making process. It cannot ask this Court to do so.

#### **IV. COUNTS VII AND VIII (positive articles, blog posts, reputation managers)**

In Counts VII and VIII, the FTC claims that IWorks violated the FTC Act by allegedly misrepresenting to consumers that certain “positive articles and other webpages” discussing IWorks’ products were “independent reviews” and “endorsements” from consumers who used IWorks’ products.<sup>96</sup> Additionally, the FTC asserts that IWorks acted improperly by hiring third-party consultants to assist IWorks in managing information stated about it online.<sup>97</sup>

To support its motion, the FTC cites to only three pieces of evidence: the deposition and declaration of former employees Sara Marker and Tracey Kramm, and a single letter that was

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<sup>96</sup> See Am. Comp. at ¶¶ 463-469; FTC Mem. DE 1280 at pp. 38-39; 58.

<sup>97</sup> See FTC Mem., DE 1280 at pp. 38-39, fn. 137-142.

1 sent to Visa on three separate occasions by IWorks and once by Jet Processing.<sup>98</sup> As shown  
 2 below, summary judgment should be denied because the FTC has failed to carry its burden of  
 3 establishing that IWorks violated the FTC Act by publishing “positive articles and other  
 4 webpages,” hiring reputation management services, or posting in online forums, and there are  
 5 genuine disputes of material fact regarding these issues.  
 6

7 IWorks hired reputation management company Reputation Hawk in the late fall of  
 8 2008.<sup>99</sup> Reputation Hawk promotes online companies, including the goods and services  
 9 offered, by providing truthful and positive commentary about the products and services in  
 10 various online forums.<sup>100</sup> Contrary to the FTC’s implication, it is not unlawful to utilize  
 11 reputation management services, nor does the FTC cite any authority so holding. Indeed,  
 12 reputation management is common in the online industry and well-known companies such as  
 13 Disney use online reputation management to control online publicly available information.<sup>101</sup>  
 14

15 IWorks retained the services of online reputation management companies partly because  
 16 IWorks did not market its products through search engine optimization. As a result, negative  
 17 online comments about IWorks were the first and usually only results that appeared if someone  
 18  
 19

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20 <sup>98</sup> See *id.*, FTC Mem., DE 1280 at pp. 31-32, fn. 137-142.

21 <sup>99</sup> DE 1238-5, Exh. 1622, A. Johnson Depo., pp. 76:5-81:4; Exh. 1641, DE 1239-10, Exh. 1641, Leavitt  
 22 Depo., pp. 60:10-61:17, and DepoExh. 1332; DE 1240-6, Exh. 1653, Riddle Depo., pp. 70:4-22; 142:10-  
 23 143:10; Exh. 1822, IW-P-0013112 (December 15, 2008 email from Reputation Hawk).

24 <sup>100</sup> DE 1240-6, Exh. 1653, Riddle Depo. pp. 70:4-71:15; *see also*, Exh. 1823, Martin dec. ¶ 3 (“We were  
 25 not asked or instructed to post false information. We were asked to write about grants and include the  
 26 names of certain sites they own within the content. We received no instruction or information from  
 27 IWorks to market any product or service.”); Exh. 1824, Declaration of Josh Stanley at ¶¶ 3-4 (never  
 “received instructions to produce false statements of supposed customers of IWorks .... All companies  
 (including some very prominent companies I have worked for) are forced to actively counter negative,  
 misleading and false information on the Internet.”)

28 <sup>101</sup> DE 1240-4, Exh. 1649, Muir Depo., pp. 69:18-69:19; DE 1240-6, Exh 1653, Riddle Depo., pp. 70: 4-  
 9; 70:23-75:6.

1 was looking for information online about IWorks or its products. IWorks wanted positive  
2 discussions to appear in those results as well.<sup>102</sup>

3 The FTC notes that IWorks “generated periodic reputation search reports that would  
4 track online comments about its products.”<sup>103</sup> That hardly seems surprising: An online  
5 business – or any business – would be foolish not to monitor its online reputation.  
6

7 The FTC also says that certain IWorks employees were “instructed not to click on any  
8 negative posts” and were only “permitted to click on positive posts” so that negative  
9 information would not be listed higher in search engine results. *Id.* at fn. 141. How is failing to  
10 make negative reviews more prominent unlawful?  
11

12 Online postings generally provided no opportunity to fix claimed issues because  
13 identifiable client contact information was usually not provided.<sup>104</sup> As such, it was easy for  
14 persons with pure or impure motives (customers, competitors, disgruntled ex-employees) to  
15 submit negative postings without a fair opportunity for the company to respond. IWorks had  
16 legitimate and non-deceptive reasons for attempting to control its reputation online, and for  
17 attempting to decrease visibility of negative online content, or issues of fact exist in that regard.  
18

19 The FTC also claims that Reputation Hawk “generate[d] fake blogs and news articles  
20 praising IWorks’ products,” and FTC witness Kramm goes so far as to speculate that IWorks  
21 specifically hired Reputation Hawk for that express purpose.<sup>105</sup> These assertions are plainly  
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24 <sup>102</sup> DE 1240-6, Exh. 1653, Riddle Depo. pp. 70:32-72:23-75:6; *see also*, Exh. 1825, Kent Depo., pp.  
25 12:14-17 (“Search engine optimization is configuring one’s Web site, and links pointing to the Web site,  
to try to rank well in search results, such as Google search results.”)

26 <sup>103</sup> FTC Mem., DE 1280 at fn. 140.

27 <sup>104</sup> *See* DE 1240-6, Exh. 1653, Riddle Depo., pp. 81:15-82:10.

28 <sup>105</sup> *See* FTC Mem., DE 1280 at 39, fn. 139.

1 disputed. First, despite its years-long investigation, the FTC fails to adduce a single phony  
 2 positive review, blog posting, or news article to substantiate its allegations. More importantly,  
 3 IWorks has adduced evidence that IWorks never instructed Reputation Hawk to make false or  
 4 unsubstantiated statements about its products. *See* fn. 100.

5  
 6 The FTC also has not attempted to adduce evidence of any relevant timeframes  
 7 regarding the alleged articles, blogs, and website postings. Timeframes are important on this  
 8 issue because prior to December 1, 2009, the FTC had not issued any guidelines governing the  
 9 use of testimonials or positive reviews. On such date, its “Guides Concerning the Use of  
 10 Endorsements and Testimonials in Advertising” (hereinafter “Endorsements Guidelines”) went  
 11 into effect.<sup>106</sup> Sara Marker testified that, as soon as the guidelines were issued, employees were  
 12 instructed to comply with them, and they did so.<sup>107</sup>

13  
 14 Citing solely to the deposition testimony of Ms. Marker, the FTC also argues that “some  
 15 of I Works, Inc.’s positive posts were actually written by its own employees - a fact that  
 16 IWorks, Inc. failed to disclose in these posts.” (FTC Mem. at 39, fn 142.) That  
 17 mischaracterizes the cited evidence and impermissibly draws inferences in the FTC’s favor.  
 18  
 19

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20  
 21 <sup>106</sup> *See* FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part  
 22 255. The contents of the guide are not technically rules. According to the FTC’s press release, they are  
 23 “administrative interpretations of the law intended to help advertisers comply with the Federal Trade  
 24 Commission Act; they are not binding law themselves.” *See* [http://www.ftc.gov/news-events/press-](http://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials)  
 25 [releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials](http://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials). For the first time, the  
 26 FTC suggested that bloggers or other individuals who “endorse” a product or service online may be  
 27 liable for civil penalties if they make false or unsubstantiated claims about a product or fail to disclose  
 28 “material connections” between themselves and an advertiser.

<sup>107</sup> DE 1240-1, Exh. 1642, Marker depo., pp. 232:3-233:7. Notice of the FTC’s Endorsements  
 Guidelines was issued on October 5, 2009, and the guides became effective December 1, 2009. Thus, to  
 the extent IWorks was allegedly responsible for web content that did not comply with the Guide (which  
 the FTC has not demonstrated), IWorks still was not violating the law. In other words, if the conduct  
 was already illegal, why would the new Endorsements Guidelines go into effect only prospectively?

1 Ms. Marker actually testified that IWorks employee Lara Clements was not posting her own  
 2 “positive reviews,” but rather she was “going in and making a comment on someone else’s  
 3 thread,” identifying herself by her own name, and then “encourag[ing] people to call” in to  
 4 IWorks’ customer service line to voice any concerns with a purchase.<sup>108</sup> There is a material  
 5 difference between Ms. Clements fabricating “positive web pages” and simply accessing other  
 6 people’s existing negative online comments to ask them to call IWorks’ customer service.<sup>109</sup>

8 The FTC has also failed to show any evidence of the breadth of dissemination of alleged  
 9 positive articles, blogs, and web postings. Under its own theory, the FTC must prove that any  
 10 alleged misrepresentations were widely disseminated to the public at large (*see* p. 64, *infra*). It  
 11 has not adduced any evidence of how many (if any) consumers ever saw the articles, blogs or  
 12 postings before making a purchase.<sup>110</sup>

14 In a similar vein, the FTC’s allegations and minimal evidence on these counts are not  
 15 tied to any specific IWorks products, and the FTC does not attempt to differentiate whether the  
 16 articles, blogs and postings were tied to IWorks’ grant or AdWords products. The FTC also  
 17 fails to identify any alleged monetary harm that it claims resulted from this conduct. Summary  
 18 judgment is, again, inappropriate.

20 **V. COUNT X (“violations of the Electronic Fund Transfer Act and Regulation E”**

22 <sup>108</sup> DE 1240-1, Exh. 1642, Marker Depo., pp. 191:22-192:19.

23 <sup>109</sup> Notably, the FTC omits the fact that Ms. Clements was authorized to pull up every negative link and,  
 24 where possible, post a statement from IWorks General Manager Ryan Riddle stating that IWorks would  
 25 resolve any concerns or issues if client would simply call in. When she would post online, Lara would  
 26 additionally provide a cell phone number that IWorks established specifically to take calls from negative  
 27 posts. It was Lara’s job to answer the phone, check the voicemails and respond on IWorks’ behalf to  
 28 resolve the issues of consumers who posted concerns regarding purchases in online forums. *See* DE  
 1240-6, Exh. 1653, Riddle Depo. pp. 81:1-84:3.

<sup>110</sup> None of the FTC’s consumers testified that they relied on articles, blogs, or website postings  
 information in making a purchase.

1 (Am.Compl. ¶¶ 473-479).

2 With respect to the Electronic Fund Transfer Act (EFTA) and its Regulation E, the  
3 Amended Complaint appears to cite these only as a standard of conduct for which a claim might  
4 be pursued under the FTC Act. In other words, the Complaint does not appear to assert  
5 violations of the EFTA *as an EFTA action under the EFTA*. See Am.Compl. ¶¶ 473-479. (The  
6 EFTA has its own enforcement mechanism. See 15 U.S.C. § 1693m.) Under no circumstances,  
7 then, can a judgment be entered against any defendant under the EFTA. Additionally:  
8

9 1. The EFTA's requirements do not apply to credit card transactions. *Sanford v.*  
10 *Memberworks*, 625 F.3d 550 (9th Cir. 2010). In discovery, the FTC admitted that 99.5% of the  
11 challenged transactions in this case were processed via credit cards,<sup>111</sup> so an issue of fact  
12 obviously exists as to whether the FTC is entitled to judgment on at least 99.5% of Count X.  
13

14 2. The FTC's arguments regarding EFTA requirements assume the same lack of  
15 disclosures that is disputed above.  
16

17 **VI. THERE IS A DISPUTE OF FACT REGARDING IWORKS' LEGAL  
18 RESPONSIBILITY FOR ACTIONS OF THIRD-PARTY BROKERS.**

19 **A. Introduction regarding affiliate marketing.**

20 IWorks marketed its products through "affiliate marketing": A vendor (IWorks)  
21 contracts with third parties called "network brokers." The network brokers, in turn, recruit and  
22 contract with "affiliates." A broker receives a commission if a purchase is made by someone  
23 referred by one of its affiliates, who most commonly send traffic to merchant sites from their  
24 own websites, blogs, etc. Affiliate marketing is used by thousands of online merchants such as  
25  
26  
27

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28 <sup>111</sup> See Exh. 1827, Plaintiff's Responses to Elite Debit's Interrogatories, #5, pp. 11-12.

1 Amazon.com, Target, Wal-Mart, Land's End, Best Buy, Home Depot, Microsoft, etc.<sup>112</sup>

2 **B. Merchants are not vicariously liable for the alleged unlawful acts of third**  
 3 **party advertisers or marketers absent an agency relationship arising from**  
 4 **actual or apparent authority.**

5 The Ninth Circuit has not had the opportunity to consider the unique aspects of an  
 6 internet-based business's liability for alleged violations of the FTC Act arising from websites  
 7 that are created, hosted and controlled by independent third-parties. However, the court has  
 8 held generally that an entity is subject to vicarious liability for an agent's violations of the FTC  
 9 Act performed in furtherance of the agency relationship. *See FTC v. Stefanchik*, 559 F.3d 924,  
 10 930 (9th Cir.2009) ("[U]nder the FTC Act, a principal is liable for the misrepresentations of his  
 11 agent acting within the scope of the agent's actual or apparent authority.") The existence and  
 12 scope of an agency relationship is generally a question of fact on which the plaintiff bears the  
 13 burden of proof. *Pacific Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir.1938); *C.A.R. Transp.*  
 14 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir.2000).

16 Two principal forms of authority give rise to an agency relationship: actual authority and  
 17 apparent authority. "[A]ctual authority refers to the power of an agent to act on his principal's  
 18 behalf when that power is created by the principal's manifestation to him. That manifestation  
 19 may be either express or implied." *Frankl v. HTH Corporation*, 650 F.3d 1334 (9th Cir.2011),  
 20 *cert. denied*, 132 S.Ct. 1821 (2012); *Restatement (Second) of Agency* § 7 (defining authority);  
 21 §§ 26-27 (standard for actual authority); *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*,  
 22 622 F.Supp.2d 890, 899 (N.D.Cal.2009) (federal common law of agency is guided by principles  
 23 set forth in the *Restatement*). "Actual authority consists of powers which a principal directly  
 24 confers upon an agent, as well as those the principal causes or permits the agent to believe he or  
 25  
 26  
 27

28 <sup>112</sup> Exh. 1828, Kent Rept., p. 4.



1 she possess.” 2A C.J.S. Agency § 133; *see also Restatement (Third), supra*, § 2.01.

2 A distinct form of agency arises from apparent authority, which is “the power to affect  
3 the legal relations of another person by transactions with third persons, professedly as agent for  
4 the other, arising from and in accordance with the other’s manifestations to such third persons.”  
5 *Restatement, supra*, § 8. It arises when a third party, distinct from the principal or agent,  
6 reasonably believes that the putative agent had authority to act on behalf of the principal and  
7 that belief can be traced to the principal’s own manifestations. *See Id.* § 2.03 & cmts. c, d;  
8 *NLRB v. Donkin’s Inn, Inc.*, 532 F. 2d 138, 141 (9th Cir.1976).

10 **C. IWorks’s brokers and marketing partners who hosted websites advertising**  
11 **IWorks’s core products and upsells were not agents of IWorks and did not**  
12 **act within the scope of their authority if they allegedly violated the law.**

13 i. Brokers and affiliates who created and hosted landing and order pages for  
14 the sale of IWorks’s core products.

15 The FTC’s memorandum (RP. 30-36) discusses claimed violations of the FTC Act that  
16 are based upon an alleged failure to disclose or adequately disclose the material terms of offers.  
17 As the FTC acknowledges, however, after 2007, the vast majority of the websites that marketed  
18 and sold IWorks’s core products were not created, hosted, or operated by IWorks; rather, third  
19 party brokers and their affiliates who had no direct relationship with IWorks maintained control  
20 over those sites. The FTC’s memorandum presumes, without analysis, the imposition of  
21 vicarious liability upon IWorks for the conduct of these third parties.

23 Apart from the FTC’s failure to brief the threshold element of agency (which would be  
24 unfair to address for the first time in a reply), issues of fact would exist in any event. IWorks  
25 contractually prohibited the network brokers, and in turn, the affiliates from violating applicable  
26 legal requirements and IWorks’s own compliance standards. IWorks provided information to  
27 network brokers regarding the marketing message, the advertising content and the product,  
28

1 including what was and was not permitted to be stated about the product. IWorks also  
2 maintained a commercially reasonable monitoring program to make sure that brokers/affiliates  
3 were following its requirements. *See* pp. 46-49, *infra*.

4 To the extent any sales sites lacked adequate disclosures and/or contained  
5 representations that the FTC alleges to be deceptive, such alleged deficiencies were the result of  
6 brokers or affiliates failing to follow IWorks' guidelines. In affiliate marketing, vendors can  
7 demand, encourage, and penalize, but they ultimately do not have the ability to control what  
8 pages are presented to consumers through the brokers' servers.

9 Nor are they automatically liable for the acts of non-agent independent contractors.  
10 Rather, courts decline to hold a principal responsible for unauthorized, uncontrolled acts of its  
11 independent contractors, and especially for its "even more remote subcontractors." *People v.*  
12 *Direct Revenue, LLC*, Index No. 401325/06 (N.Y. Sup. Ct., May 20, 2008). In *Direct Revenue*,  
13 for example, a producer of software that generated pop-up ads geared to a particular consumer's  
14 internet usage contracted with third party distributors for those pop-ups, who then in  
15 turn arranged for subcontractors to disseminate the ads. The court found these distributors to be  
16 "independent contractors," and reasoned that a "principal is generally not liable for the acts of  
17 an independent contractor because of the lack of control over how the contractor's work is  
18 performed." Slip. Op. at 9 (citing *Chainani v. Bd. of Educ.*, 87 N.Y.2d 370, 380-81 (1995)).

19 The court further stated that "[n]either may the principal be charged with the conduct of  
20 even more remote subcontractors." *Id.* *Direct Revenue* was "not authorized or obligated to  
21 control" the work of the third parties, "particularly since many of them additionally acted as  
22 distributors for various other contractors." *Id.* at 9-10. And even though the pop-up ads were  
23 all initially generated by Direct Revenue, "mere participation in the installation [of the software]  
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1 is insufficient [to establish liability], absent proof of involvement in the original deceptive  
2 conduct which induced the installation.” *Id.*

3 Moreover, “allegations that [Direct Revenue] had general and/or constructive knowledge  
4 of some distributors’ wrongful practices [were] insufficient to impose liability.” *Id.* (*citations*  
5 *omitted*). The court recognized Direct Revenue’s efforts to remedy problems caused by its  
6 contractors and subcontractors, appreciating that “in those few instances in which [Direct  
7 Revenue] obtained actual knowledge of a distributor’s misconduct, it took significant steps to  
8 modify its procedures.” Merely because Direct Revenue “may have benefited financially from  
9 its relationship with the distributors before remedial measures were implemented,” *id.* at 11, did  
10 not make it liable for the acts of the third parties.  
11

12 In *U.S. v. Cyberheat, Inc.*, 2007 WL 686678 (D.Ariz. 2007), the Department of Justice  
13 “on behalf of the Federal Trade Commission” sued Cyberheat, Inc., alleging violations of the  
14 CAN-SPAM Act of 2003 arising out of emails that contained sexually explicit images and  
15 content. The Government sought summary judgment, arguing that Cyberheat was liable for the  
16 conduct of certain marketing affiliates who sent the allegedly the emails and received  
17 commissions from Cyberheat. *Id.* It argued that Cyberheat “did not screen affiliates, supplied  
18 affiliates with pornographic promotional materials, did not monitor or oversee its affiliates’  
19 promotional activities, and did not readily terminate affiliates after complaints of uninvited  
20 sexually explicit spam.” *Id.*  
21

22 Cyberheat argued that there were questions of fact regarding whether the affiliates were  
23 in fact agents for whose conduct it was vicariously liable. Cyberheat cited evidence of disputes  
24 regarding “whether it actually allowed its affiliates to use its marketing tools in illegal emails,  
25 reflecting direct evidence of knowledge/intent; whether any terminated affiliates were ever  
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1 reinstated; whether it was feasible for Defendant to monitor the activities; and, whether there  
2 was affirmative consent to 21 of the purportedly violative emails.” *Id.* at \*11.

3       The court agreed with Cyberheat, noting that “Cyberheat’s ability to control, monitor  
4 and supervise affiliates is a fact question.” *Id.* at \*12. “The question of agency is a factual  
5 matter,” the court observed, “and, if any legally sufficient evidence of an agency relationship is  
6 produced, it must be submitted to the fact-finder.” *Id.* at \*13. Issues of fact also existed as to  
7 whether Cyberheat had “[n]otice of the violations ...and whether [Cyberheat’s] response to the  
8 notice of the affiliates’ violations was reasonable under the circumstances[.]” *Id.* at \*14.  
9 Summary judgment was denied even though the Government adduced evidence “that Cyberheat  
10 received information that the affiliates were violating the Statute and then did not follow their  
11 own promise to terminate violating affiliates.” *Id.*

14       Further guidance regarding liability for affiliate marketers’ actions was recently  
15 provided in *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir.2013). In that case,  
16 Lens.com sold contact lenses online competing with other online vendors such as the plaintiff  
17 1-800 Contacts, Inc. Like IWorks, Lens.com used affiliate marketing to send customers to  
18 Lens.com’s website. 1-800 Contacts later sued Lens.com for alleged trademark violations  
19 based on some affiliate marketers’ use of allegedly proprietary keywords in various online  
20 advertisements. The trial court granted summary judgment to Lens.com, holding that it was not  
21 responsible for its affiliates’ claimed misconduct.  
22

24       The Tenth Circuit affirmed, noting that “[v]icarious liability arises when common-law  
25 principles of agency impose liability on the defendant for the infringing acts of its agent.” *Id.* at  
26 1249. 1-800 Contacts argued that the affiliates were agents of Lens.com, and Lens.com  
27 conversely argued that “that its affiliates “ha[d] no authority, apparent or actual, to act on behalf  
28

1 of Lens.com,” but the Court declined to resolve the issue. “The issue is not whether [the  
 2 affiliate] had authority to act on Lens.com’s behalf at all, but merely whether he had actual  
 3 authority to publish an ad” that violated the law by infringing upon a trademark. *Id.* at 1251.  
 4 Even assuming *arguendo* that the affiliates were agents of Lens.com, they did not have specific  
 5 authority from Lens.com to violate 1-800 Contact’s trademark, the court concluded, and  
 6 Lens.com could not be held liable for the claimed violation. *See also Tiffany Inc. v. eBay Inc.*,  
 7 600 F.3d 93 (2nd Cir.2010) (eBay’s general knowledge that its service was being used to sell  
 8 counterfeit goods was insufficient to impose liability, even though eBay received commissions  
 9 on sales; question was whether eBay took steps upon being notified of specific violations).  
 10

11  
 12 The defendants’ expert has opined that, if the factfinder finds true at trial Iworks’ cited  
 13 evidence of monitoring – not perfect, but reasonable – then IWorks met the standard of care in  
 14 the industry. *See* fn. 125, *infra*. Issues of fact exist as to whether actual or apparent agency  
 15 existed, which the FTC must prove individually for each challenged broker.  
 16

17 ii. Marketing partners who sold IWorks’s products as upsells in connection  
with the marketing partner’s own core product.

18 Like its contracts with the network brokers, IWorks’s agreements with the marketing  
 19 partners required websites and advertisements to comply with the law and with IWorks’s  
 20 internal standards, which IWorks understood to be more stringent than legally required.<sup>113</sup> (As  
 21 noted below, brokers and sales agents frequently complained that IWorks’s standards were  
 22 unnecessarily stringent.<sup>114</sup>)  
 23

24 Marketing partners had independent businesses and products of their own that were  
 25

26  
 27 <sup>113</sup> *See e.g.* Exh. 1084 pp. 1-7 (Skunk Works marketing agreement); 8-11 (addendum to Skunk Works  
 28 marketing agreement); *see also* pp. 59-60, *infra* (IWorks believed its standard exceed the law).

<sup>114</sup> *Id.*

1 distinct from IWorks's products. Thus, for example, the FTC's cited consumers described  
2 purchasing products such as dietary supplements (including acai berry pills (DeWitt and Ellis)  
3 and EstroPause (Easterwood)), health bars (Melton), and sports hydration drinks (Cienfuegos),  
4 none of which are claimed to be IWorks products. The fact that IWorks's marketing partners  
5 operated their own businesses and sold unrelated vendors' products undercuts any contention  
6 that IWorks controlled the marketing partners' sites.

8 The FTC cites to evidence that, for certain marketing partners who sold IWorks's  
9 products as upsells, IWorks provided merchant processing and customer service for the  
10 marketing partner's product. But the fact that a company is able to sell its customer service  
11 services does not mean the company is now controlling the buyer. Under the FTC's theory,  
12 vendors would be unable to market services to entities who also happen to be third-party  
13 marketers for fear of suddenly imposing liability on themselves that would not otherwise exist.

15 Moreover, as the FTC concedes, IWorks did not perform customer service or merchant  
16 processing for all of its marketing partners; it had numerous marketing partners between 2006  
17 and the cessation of its business, but the FTC cites only two marketing agreements. It has not  
18 met its burden of showing an undisputed agency relationship between IWorks and each of its  
19 marketing partners.  
20

21 **D. There is a genuine dispute of material fact regarding whether IWorks**  
22 **utilized reasonable compliance efforts with respect to its affiliates and**  
23 **marketing partners.**

24 Three of the main network brokers with whom IWorks contracted were: V.O. Media,  
25 Cathexis and PVI.<sup>115</sup> IWorks did not pay its affiliates directly or even know who they were;  
26

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27 <sup>115</sup> DE 1238-8, Exh. 1626, J. Johnson depo., 251:1-7  
28

1 IWorks paid the network brokers, and the brokers paid their affiliates.<sup>116</sup> IWorks' typical broker  
2 contracts provided that the broker or affiliate had the responsibility for its own website, and that  
3 IWorks bore no such responsibility; similarly, IWorks' agreements with marketing partners who  
4 sold IWorks' products as upsells typically provided that the upseller would abide by all federal  
5 and state laws, rules and regulations.<sup>117</sup>

7 As discussed further below, IWorks maintained a compliance team headed by in-house  
8 attorney Philip Gubler. IWorks communicated its expectations regarding compliance to brokers  
9 on an ongoing basis, through marketing agreements, frequent email communications, telephone  
10 and in-person discussions, and a document called IWorks Compliance Rules. IWorks also sent  
11 research regarding the FTC Act, the FTC's "DotCom Disclosures," and relevant FTC releases  
12 as well as case law interpreting the FTC Act.<sup>118</sup>

14 In 2008, IWorks launched an inventive tool for policing brokers and marketing partners:  
15 IWorks required these entities to place a JavaScript tracking pixel on their landing and order  
16 pages; if a customer placed an order through the website, the corresponding URL would then be  
17 automatically forwarded to IWorks. IWorks employees could then access the URLs and review  
18 the sites, notifying brokers and marketing partners of concerns the same day and in bi-weekly  
19

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22 <sup>116</sup> *Id.*, 40:22-25

23 <sup>117</sup> Exh. 1829, Marketing Agreement Addenda (CJ-IWORKS-0986-87, 1005-08) (PVI, Cathexis and  
24 Virgin Offer addendums prohibit changes or affiliates from violating the law, and impose responsibility  
25 on brokers and affiliates for website content.)

26 <sup>118</sup> DE 1238-8, Exh. 1626, J. Johnson Depo., 76:18-77:6; 81:5-82:21 and Depo.Exh. 1289 (compliance  
27 rules); DE 1238-1, Exh. 1617, Gubler depo., 17:17-19:9. IWorks felt it was necessary to provide this  
28 level of detail because when brokers and affiliates contended that IWorks was being too strict and that its  
requirements went beyond what the law required, IWorks wanted to show them why it was requesting  
changes. *Id.*

1 summaries.<sup>119</sup>

2 IWorks generally imposed phased penalties for brokers who violated, or allowed their  
3 affiliates to violate, IWorks requirements. It would seek voluntary compliance, then issue  
4 written warnings, withhold payment, reject sales, and finally, terminate the relationship.<sup>120</sup> For  
5 example, Jeremy Johnson personally spoke to the owner of one broker, Cathexis, and asked him  
6 to resolve some reported IWorks' concerns. When that did not occur to Mr. Johnson's  
7 satisfaction, IWorks terminated the relationship with Cathexis.<sup>121</sup> IWorks also terminated  
8 marketing partner Viable upon learning of problems with its website, unilaterally cancelling  
9 tens of thousands of viable sales.<sup>122</sup> On another occasion, IWorks learned that another  
10 marketing partner ("That's It Media") was showing pages to IWorks that were consistent with  
11 IWorks' standards, but then materially changing them after receiving approval. IWorks denied  
12 payment and terminated the contract.<sup>123</sup>

13 "There is a practical limit to what a merchant can do to 'police' their affiliates." No  
14 merchant with any significant affiliate marketing program (*e.g.*, Amazon has 2 million  
15 affiliates) can be expected to control all of the activities of its advertising partners.<sup>124</sup> It can  
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20 <sup>119</sup> See, *e.g.*, Exh. 1830, D. Partridge (IWorks) email to J. Lund (V.O.), Mar. 26, 2009 [IW027505-13].  
21 Ironically, the FTC criticizes IWorks because brokers did not always meet this requirement, but as FTC  
22 investigator Jacobsen said, he was not aware of any other vendor even attempting this voluntary type of  
monitoring program. Exh. 1801, Jacobsen depo., pp. 176:17-177:3.

23 <sup>120</sup> DE 1238-8, Exh. 1626, J. Johnson depo., pp. 87:15-88:19; DE 1238-1, Exh. 1617, Gubler depo., pp.  
24 125:21-127:6.

25 <sup>121</sup> DE 1238-8, Exh. 1626, J. Johnson depo., pp. 88:10-90:15.

26 <sup>122</sup> *Id.*, 55:24-59:4; 88:10-18; 104:11-105:8; Exh. 1294; DE 1238-1, Exh. 1617, Gubler depo., p. 26:15-  
27 23.

28 <sup>123</sup> DE 1238-8, Exh. 1626, J. Johnson depo., pp. 122:24-123:20 and Exh. 1302.

<sup>124</sup> Exh. 1828, Kent Report at p. 7; Exh. 1825, Kent depo., pp. 113:14-114:1.



only be expected to reasonably try, and to take reasonable steps when it learns of a violation. The defendants' online marketing expert has testified, without contradiction, that the efforts described above would be reasonable under the circumstances and under relevant industry standards<sup>125</sup>, and summary judgment is inappropriate.

## **VII. THE FTC'S OTHER "INDICIA" OF FRAUD ARE DISPUTED.**

The FTC asserts some additional facts that it does not claim to violate the FTC Act, but instead offers as "indicia" of fraud. In this sense, the FTC seems to be premature; this type of evidence is typically more appropriate for trial than a motion for summary judgment. But in any event, the FTC's facts are disputed.

### **A. Chargeback rates**

The FTC cites *FTC v. Grant Connect, LLC*, 827 F. Supp.2d 1199, 1222 (D. Nev. 2011) – one of the cases in which no contrary evidence was offered by the defendants – for the proposition that a chargeback rate exceeding a standard voluntarily adopted by card associations (1%) is an indicium of fraud. Regardless of whether that is so, the FTC's argument is flawed:

The FTC uses percentages from narrow windows of time and falsely implies that the percentages were the same throughout the challenged period (January 2006-December 2010). Thus, for example, the FTC fails to mention that, in 2005-2007, IWorks' overall chargeback rate was under 1% for nearly this entire period. Even through the end of 2008, the overall chargeback rate remained at 1.4%. In 2008, when the level of credit card fraud was at its steepest incline, chargebacks still did not exceed 3.34% overall.<sup>126</sup>

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<sup>125</sup> Exh. 1828, Kent Report at p. 9; Exh. 1825, Kent depo., 116:15-117:14.

<sup>126</sup> Exh. 1831, Payne Second Dec., ¶¶ 5-6, and ex. C and D (chargeback history); DE 1262-1, Exh. 1426, Vigil Report, p. 19 (Summary of Total Chargebacks Compared to Total Gross Revenue).

1 Even in the periods where chargeback rates crept higher than 1%, to a great extent it was  
 2 caused by growth in certain types of fraud, well known in the internet marketing industry, that  
 3 are unrelated to the clear and conspicuous nature of website disclosures. Those included:

4 1. “Credit card” fraud: Credit cards are often tested by identity thieves by  
 5 making small online purchases, such as the shipping and handling charge on an IWorks CD, the  
 6 verify whether the credit card is working. These fraudulent charges then often escalated to  
 7 chargebacks from customers who were unaware of even the initial purchase, let alone the  
 8 monthly membership accompanying that purchase<sup>127</sup>

9 2. “Affiliate” fraud: Affiliates provide credit cards to individuals to make  
 10 purchases, thereby generating commissions for the affiliates. These hired purchasers then not  
 11 only request a cancellation or refund, but also do a chargeback so that the credit card retains its  
 12 balance for additional purchases. These purchases were often evidenced by a “customer” who  
 13 would buy every product sold by IWorks within a short period of time, or repurchase the same  
 14 product after obtaining a refund.<sup>128</sup> Throughout 2009, approximately 60% of IWorks’  
 15 chargebacks were attributable to affiliate fraud.<sup>129</sup>

16 3. “Friendly” fraud: With inaptly named “friendly” fraud, consumers who  
 17 knowingly made purchases – and who had even used the product or service – took advantage of  
 18 a change in credit card chargeback procedures whereby cardholders could now dispute any  
 19 charge by simply clicking one button. With this change, friendly fraud chargebacks rose  
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 25 <sup>127</sup> DE 1240-6, Exh. 1653, Riddle depo., p. 59:3-16; *see, e.g.*, Exh. 1807, Merrell depo., pp. 28:5-13,  
 26 33:2-36:15 (victim of identity theft did not know about any purchases).

27 <sup>128</sup> DE 1240-6, Exh. 1653, Riddle depo. pp. 95:15-96:25; Exh. 1828, Kent Rept., p. 11.

28 <sup>129</sup> DE 97, Payne Dec. ¶32.

1 dramatically throughout the online industry.<sup>130</sup>

2 It was only when these types of fraud escalated in the online industry in late 2008-2009  
3 that IWorks' chargeback rate really exceeded levels that were unworkable, and it became  
4 evident that brokers and affiliates simply could not be controlled in this market without  
5 separating each product into its own processing account in order to identify brokers and  
6 affiliates who were causing the most chargebacks.<sup>131</sup>

8 The FTC's citation to chargeback figures is also misleading in other ways:

9 1. The FTC's figures artificially inflate rates for products involving monthly  
10 memberships or charges: With a single customer who claims not to have read the disclosures,  
11 or whose identity was stolen, a chargeback of two monthly payments would be double counted  
12 when, in fact, it was a single purchase. That is different from a company that sells a single  
13 charge product and then faces one chargeback.

15 2. When the percentage first exceeded the 1% ratio, IWorks developed  
16 filters to reduce third-party fraud (and thereby chargebacks). Among other things, these filters  
17 a) blocked customers from recharging for multiple products just to improve sales for a particular  
18 affiliate; and b) identified and blocked carding attacks (where individuals test a website with  
19 consecutively numbered credit cards until they find a combination that works). These measures  
20 drove chargebacks back down below 1% in 2007 and into 2008.<sup>132</sup>

23 <sup>130</sup> Exh. 1832, CJ-IWORKS 00751-752; Exh. 1828, Kent Rept., p. 10.

24 <sup>131</sup> Exh. 1831, Payne Second Dec. ¶¶ 3-4, ex A and B; DE 1238-8, Exh. 1626, J. Johnson depo., pp. 41-  
25 49; DE 1240-6, Exh. 1653, Riddle depo., pp. 273:16 - 281:13.

26 <sup>132</sup> DE 1238-8, Exh. 1626, J. Johnson depo., pp. 41-49; Exh. 1831, Payne Second Dec., ¶¶ 9-12, and ex F  
27 (showing over 1,385,000 sales blocked using IWorks fraud filters, each of which was blocked because  
28 there had been a previous, unblocked purchase that included duplicate products (439,000), chargebacks  
(87,000), refunds (79,500), cancelled at trial (42,700), and other duplicate fraud filters)). Most of these  
blocked charges would be accompanied by a previously fraudulent charge that was undetected. *Id.*

1           3.       The FTC tries to lump a calculation of IWorks's chargeback ratio in with  
2 IWorks's refund ratios, as if the two concepts are the same. But the evidence supports a  
3 contrary inference, that customers who called to request refunds understood the terms and  
4 conditions of the contract they entered and simply forgot to cancel.<sup>133</sup>

5  
6           4.       The FTC also uses some product-specific chargeback figures that it  
7 knows are misleading. (*E.g.*, FTC Mem., p. 41.) When a product line is terminated or sales  
8 decline, that artificially inflates chargeback rates on those products, because chargebacks are  
9 calculated as chargebacks for this month/sales for this month – but chargebacks are always for  
10 purchases made earlier. As an example, assume that 1,000 widgets are sold in October, but only  
11 100 widgets the following January. In January, 20 chargebacks come through on those October  
12 purchases. As measured by credit card companies, that is a “20%” chargeback rate for January,  
13 when it was really 2% of the October purchases.<sup>134</sup>

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15           **B.       Processing companies.**

16           The FTC cites the use of multiple processing accounts as suggesting fraud for the 2006-  
17 2010 period. There are several problems with that: First, IWorks operated with only one or two  
18 processing accounts from January 2006 through July 2008.<sup>135</sup> Under the FTC's theory, this  
19 militates against an inference of fraud during that time. Second, this argument by the FTC puts  
20 at issue the defendants' reason for utilizing such companies, and that is disputed: There is  
21 ample evidence that the intent was not to deceive banks, customers, the FTC, or anyone else,  
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23

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25 <sup>133</sup> DE 1237-5, Exh. 1608, Cox depo., pp. 55:9-56:2, 93-94; *also* Exh. 1626, J. Johnson depo., pp. 98:5-  
26 101:13.

27 <sup>134</sup> DE 1240-6, Exh. 1653, Riddle depo., pp. 59:25-60:3

28 <sup>135</sup> Exh. 1831, Payne Second Dec. ¶¶ 1-4 ex A and B (summary of Processing Accounts).

1 but instead to track and possibly isolate instances of fraudulent chargebacks.<sup>136</sup>

2 IWorks undertook this strategy at the suggestion of an Independent Sales Organization  
3 with which it had been working.<sup>137</sup> With this strategy, as IWorks brought in a new client, it  
4 would create a new company to run the processing for that client's business so as to avoid the  
5 possibility of the new client's processing being adversely affected by affiliate fraud chargeback  
6 issues in other accounts.<sup>138</sup>

8 The creation of additional merchant accounts through these other companies—which the  
9 FTC conclusorily labels “shell companies”—was perfectly legal, and there is no evidence that  
10 any consumers were misled or otherwise harmed by this practice. Nor was there any harm to  
11 the processing companies that held the accounts or to the card companies. The processing  
12 companies that held the accounts and were acting on behalf of banks were fully aware that they  
13 were related to activity by IWorks and Jeremy Johnson. In fact, the processing companies  
14 asked Mr. Johnson to submit a personal guaranty for the various accounts, and he obliged.<sup>139</sup>

### 16 **C. BadCustomer.com.**

17 The FTC has stated in this case that it does not claim the creation or reference to  
18 BadCustomer.com to have violated the FTC Act. DE 125, p. 9, ¶18. Nonetheless, it cites the  
19 website as another supposed “indici[um]” of fraud. This argument by the FTC again puts at  
20 issue the defendants' state of mind, which is disputed:  
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24 <sup>136</sup> DE 1240-6, Exh. 653, Riddle depo., pp. 273:16-281:13; DE 1238-8, Exh. 1626, J. Johnson depo., pp. 243:19-246:8.

25 <sup>137</sup> DE 1238-8, Exh. 1626, J. Johnson depo. pp. 245:1-246:8.

26 <sup>138</sup> DE 97, Payne dec., ¶ 34; DE 1240-1, Exh. 1626, J. Johnson depo., pp. 245:1-246:8.

27 <sup>139</sup> DE 1239-7, Exh. 1638, Kramm Depo. p. 232:5-9; DE 1240-1, Exh. 1642, Marker Depo., pp. 88:17-  
28 100:6 (discussions with banks and processing companies about additional accounts); 213:17-214:2 (Jeremy was personal guarantor).

1 As problems with multiple types of fraud escalated in the industry, IWorks correctly saw  
2 a need for both vendors and innocent consumers to protect themselves, and it created  
3 BadCustomer.com. This website offered several types of services: It provided vendor members  
4 with a means of screening potential customers to detect chargeback-fraud risk, it offered  
5 consumers a free dispute resolution service, and it encouraged customers to contact customer  
6 service representatives directly before initiating chargebacks through their banks.<sup>140</sup> The idea  
7 arose from a discussion between Jeremy Johnson and Martin Elliot of Visa, who said it was a  
8 merchant's responsibility to motivate consumers to contact the company before initiating a  
9 chargeback.<sup>141</sup>

10  
11  
12 Businesses that used BadCustomer.com configured filters to determine the parameters  
13 according to which sales would be flagged. When the business received payment information  
14 for a potential sale, the BadCustomer database screened the information to determine whether  
15 the customer posed an unacceptable chargeback risk. If so, the merchant was presented with the  
16 choice to accept or decline the sale. If the sale was declined, the customer was directed to the  
17 GateKeeper system. There, the consumer had the option of signing a "No Future Chargebacks"  
18 Agreement or cancelling the sale. Restricted customers who signed the agreement were  
19 permitted to complete their transactions if they so chose.<sup>142</sup> BadCustomer had a legitimate  
20 purpose and provided a useful service, and issues of fact exist on this issue.

21  
22 **VIII. AN ISSUE OF FACT EXISTS AS TO WHETHER THE DEFENDANTS RELIED**  
23 **ON THE ADVICE OF COUNSEL OR OTHERWISE LACKED AN INTENT TO**  
24

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25 <sup>140</sup> Exh. 1801, Jacobsen depo., pp. 79:13-83:20, citing Exh. 961 and 962.

26 <sup>141</sup> DE 90, Johnson Dec., ¶3.

27 <sup>142</sup> *Id.*, ¶ 4.

1 **VIOLATE THE ACT.**

2 Ordinarily, the FTC takes the position that a defendant's state of mind, and whether it  
3 relied upon advice of counsel, are not available defenses to an FTC Act violation. In this case,  
4 however, the FTC has waived that position and acknowledged that the defendants may assert  
5 this defense by using in the FTC's case in chief attorney-client communications that it admits  
6 are relevant only to such a defense.  
7

8 When IWorks's servers and records were seized, its communications with in-house  
9 counsel Gubler and outside counsel were all secured by an FTC "taint team" to prevent FTC  
10 litigation counsel from violating attorney-client privilege. DE-1110. Nevertheless, near the end  
11 of discovery, the FTC filed an "emergency" motion to seek the defendants' privileged material  
12 "to the extent it constituted legitimate advice of counsel on the FTC matters upon which the  
13 inside and outside attorneys advised IWorks and the other defendants." *Id.*  
14

15 Objections to the production of this privileged material were filed, noting that the FTC  
16 cannot both deny an advice-of-counsel defense while affirmatively using evidence relevant only  
17 to an advice of counsel defense. (DE-1114). Magistrate Judge Foley allowed the production of  
18 advice-of-counsel communications to the extent the FTC's "taint lawyer" could identify them as  
19 such.<sup>143</sup> The taint lawyer then gave the FTC all such material.  
20

21 Among the many documents were emails reviewing brokers and affiliate websites for  
22 compliance<sup>144</sup>, emails showing secret buys to check for thank you emails and customer service  
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26 <sup>143</sup> See DE-1116 ("The Court grants the [FTC's] motion on the basis stated on the record, in terms of the  
27 scope of the waiver of the attorney/client privilege *to the extent of the affirmative defenses* raised by  
defendant I Works and/or by defendant Johnson.") (emphasis added).

28 <sup>144</sup> See, e.g., Exhs. 1089, 1090, 1091, 1092 to Gubler Depo.

1 compliance,<sup>145</sup> pixel reports identifying to brokers and the compliance team changes to websites  
 2 that IWorks was requiring to comply with IWorks standards<sup>146</sup>, legal briefs to advise IWorks  
 3 employees<sup>147</sup>, research and advice from outside counsel to Mr. Gubler<sup>148</sup>, etc.

4 Mr. Gubler was hired in May 2005 specifically to oversee compliance, first with a  
 5 telemarketing campaign and then with issues associated with IWorks' internet offerings.<sup>149</sup>  
 6 IWorks directed workers to him with legal questions and training regarding compliance<sup>150</sup>. He  
 7 attended compliance meetings at IWorks, and most importantly reviewed hundreds of pages of  
 8 landing and order pages submitted for approval by IWorks employees in charge of developing  
 9 such pages. Mr. Gubler had specific approval to determine what approach IWorks should take  
 10 in trying to interpret the vague maze of disclosures, where they should be, and related issues.<sup>151</sup>

13 In addition to looking at pages developed by IWorks, Mr. Gubler also reviewed pages  
 14 pulled in from brokers' and upsellers' web pages after their changes were made to review  
 15 compliance with the guidelines that IWorks set up and tried to follow. Later, when the pixel  
 16 program and other compliance measures were set up to try and keep up with changing web  
 17 pages developed by brokers, Mr. Gubler was at the heart of these programs and making  
 18

19  
 20 <sup>145</sup> See, e.g., Exh. 1087, parts 1 and 2 to Gubler Depo.

21 <sup>146</sup> See Exhs. 1093, 1094, 1095 to Gubler Depo. (Pixel Reports).

22 <sup>147</sup> See, e.g., Exh. 1085 to Gubler Depo. (April 2009 18-page summary of legal documents and emails  
 23 and Jeremy Johnson's response); Exh. 1086 to Gubler Depo. ("This is an excellent document and I think  
 24 we should send this to all the people we work with that deal in negative options and upsell etc.").

25 <sup>148</sup> DE 1260-1, Exh. 1234 to Gubler Depo.

26 <sup>149</sup> DE 1238-1, Exh. 1617, Gubler Depo., pp. 9:9-10:9.

27 <sup>150</sup> DE 1240-1, Exh. 1642, Marker depo., p. 19:10-20, pp. 226:12-227:12; DE 1239-7, Exh. 1638,  
 28 Kramm depo., p. 103:1-22.

<sup>151</sup> DE 1238-1, Exh. 1617, Gubler depo., pp. 10:10-15:20.



1 recommendations regarding the rejection of orders, the payments withheld for broker  
 2 noncompliance, and termination of contracts with some brokers who refused to comply with the  
 3 guidelines he enacted and enforced.<sup>152</sup>

4 Mr. Gubler himself relied on the advice of counsel<sup>153</sup> and advice provided in a Negative  
 5 Option Workshop put on by the FTC in 2007.<sup>154</sup> That seminar emphasized only that the  
 6 disclosures were to be in “immediate proximity” to the “payment information” so consumers  
 7 could see the disclosures on the same page prior in time to hitting the submit button.<sup>155</sup>

8 During the conference, Jeremy Johnson realized that he was sitting next to a Midwest  
 9 Region director of the FTC. Mr. Johnson asked the director about the meaning of “clear and  
 10 conspicuous.” She asked if IWorks’ disclosures were “anywhere in the vicinity of” the submit  
 11 button and whether the price and terms of the core product and the upsells were contained in the  
 12 disclosures, and directed him to the materials that had been handed out.<sup>156</sup> Those materials  
 13 included examples with disclosures below the submit button.<sup>157</sup> This information was  
 14 communicated to Mr. Gubler, along with the materials (some of which were later published on  
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 16  
 17  
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21 <sup>152</sup> *E.g., id.*, pp. 15:21-17:19, 20:24-28:19; 195:9 - 196:3, and Exh. 1091, pp. 1-2 (disputes regarding  
 22 IWorks refusal to pay).

23 <sup>153</sup> DE 1238-1, Exh. 1617, Gubler depo., p. 251.

24 <sup>154</sup> *Id.*, p. 10:10-24.

25 <sup>155</sup> *See* Exh 1835 (CJ-IWORKS 00724-46, Negative Options Workshop handout from 2007); *see also*  
 26 Exh. 1817, Bloom depo., pp. 94:16 - 96:18, interpreting workshop materials as establishing a temporal,  
 not geographical, guideline regarding the submit button.

27 <sup>156</sup> DE 1238-1, Exh.1626, J. Johnson depo., pp. 61:20-66:1.

28 <sup>157</sup> Exh. 1086 pp. 135-154, to Gubler depo.

1 the FTC website in 2009).<sup>158</sup>

2 On each of the challenged issues in this case (for example, placement of disclosures), a  
 3 factfinder could conclude that IWorks reasonably relied on counsel and the FTC workshop  
 4 examples, and lacked any intent to violate the Act. The FTC cites a few emails that reflect  
 5 occasional differences of opinion or gray areas, but ignores all other communications reflecting  
 6 good faith efforts to follow counsel's advice. The FTC will argue that IWorks did not follow  
 7 Mr. Gubler's advice on some issues, but when Mr. Gubler affirmatively opined that something  
 8 was a violation (rather than arguable) and that IWorks could not do it, IWorks followed that  
 9 advice.<sup>159</sup> Moreover, the FTC ignores the fact that, as a risk-avoidance measure, IWorks was  
 10 seeking input that would exceed what the law required. IWorks sought this same precautionary  
 11 counsel not only from Mr. Gubler, but from outside counsel Linda Goldstein.<sup>160</sup>

14 Ironically, the FTC believes that a July 2009 email from Ms. Goldstein is damning,  
 15 when the converse is true. In that e-mail, Ms. Goldstein responded to requests for advice by  
 16 indicating that, at that time, "the FTC" would dispute the placement of some disclosures.<sup>161</sup>  
 17 Significantly, however, Ms. Goldstein did not state that she agreed with the FTC's position (nor  
 18 would she so testify at trial). To the contrary, Ms. Goldstein has informed the FTC that she  
 19 believes IWorks was compliant with all FTC Act requirements, and produced many examples to  
 20

22 <sup>158</sup> DE 1238-1, Exh. 1617, Gubler depo., pp. 10:14-24; 12:25-13:22 and Exh. 1086, pp. 85-157.

23 <sup>159</sup> DE 1238-8, Exh. 1626, J. Johnson, pp. 109:21-112:5, and Exh 1298, ("And I'm telling Phillip here—  
 24 the part the FTC cut out was I told Phillip that if you—after he'd explained all these things, the changes  
 25 they wanted to have made, I tell Phillip that, okay, if you get any resistance to changing the sites, let me  
 26 know and I will get it done."); DE 1238-1, Exh. 1617, Gubler Depo., pp. 81:3-14, 125:21-127:19, Exh.  
 27 1089, pp. 3-4 (Gubler approving placement of terms and condition adjacent to submit button in February  
 28 2010); and Exh. 1090, pp. 2-5 (Jeremy concurring in Gubler's advice regarding upsells and compliance.)

<sup>160</sup> DE 1238-1, Exh. 1617, Gubler depo., p. 251.

<sup>161</sup> See DE 1260-1, Exh. 1234 to Gubler Depo.

1 support that belief.<sup>162</sup>

2 The defendants' belief that the input it was receiving from Mr. Gubler, Ms. Goldstein,  
3 and others exceeded legal requirements was reaffirmed by complaints from brokers and sales  
4 agents that IWorks was imposing standards that were not legally required, including arguments  
5 from the brokers' own attorneys to that effect.<sup>163</sup>

7 The FTC not only obtained all of these privileged communications, but they were then  
8 able to question Mr. Gubler at length – again, based on an advice of counsel defense<sup>164</sup> - about  
9 the advice that was provided to IWorks on virtually every aspect of the business from the  
10 landing and order pages, location and content of disclosures, to the setting up of business  
11 entities for use in processing.

13 The FTC has cited privileged communications more than two dozen times in its two  
14 motions for summary judgment. Because it is relying so heavily on evidence that it obtained  
15 only by claiming it was legitimate advice of counsel to the defendants, the FTC cannot now  
16 deny defendants this defense. Put differently, the FTC cannot recognize the advice of counsel  
17 defense in order to intrude into the defendants' privilege, and then claim the defense does not  
18 exist. That is especially true where the FTC filed these privileged communications – including  
19 the *entire deposition* of Phillip Gubler and Ms. Goldstein's email – not under seal, open to  
20 public view in a high-profile case. That bell cannot be unrung.

22 In the alternative, if the FTC continues to claim that advice of counsel and lack of intent  
23 to violate the law are not a legitimate defense, then every single citation or privileged  
24

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27 <sup>162</sup> See Exh 1835, CJ-IWORKS 00724-46.

28 <sup>163</sup> E.g., DE 1240-1, Exh. 1642, Marker depo., pp. 74:12-76:22.

1 communication should be disregarded, along with all arguments (Counts I, II, III, IV, V, VI,  
2 VII, VIII and IX) to the extent they rely on the ill-gotten communications.

3 At a minimum, issues of fact exist in this case as to whether IWorks (and, derivatively,  
4 all other defendants in the case) reasonably relied on the advice of counsel or otherwise lacked  
5 intent to violate the FTC Act. While no compliance program is – or can be – 100 percent  
6 foolproof (or fraud-proof), IWorks asked for, and implemented, recommendations that exceeded  
7 applicable law based on the advice from their attorneys, and lacked any intent to violate the law.  
8

9 **IX. THE FTC MUST SHOW THAT A REPRESENTATIVE SAMPLE OF**  
10 **CONSUMERS RELIED ON EACH ALLEGED MISREPRESENTATION.**

11 Proximate cause is a bedrock concept in the law. The FTC seeks an exception, citing  
12 *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595 (9th Cir.1993) for the proposition that it need not show  
13 reliance on an alleged misrepresentation by any consumer, if it can show that the  
14 misrepresentation was “widely disseminated”. There are two problems with that contention:  
15

16 **A. The “fraud on the market” theory upon which the claimed reliance**  
17 **presumption is based is unsupported and in jeopardy.**

18 *Figgie’s* rebuttable presumption, which equates causation with reliance, was primarily  
19 derived from securities law’s fraud-on-the-market (“FOTM”) theory. However, this  
20 presumption is based on a misunderstanding and misapplication of the case law; moreover, the  
21 FOTM concept has been largely discredited and the U.S. Supreme Court is poised to overturn it  
22 in the next few months, neutralizing *Figgie* and other cases that rely on it.  
23

24 The reliance presumption was first articulated in *FTC v. International Diamond Corp.*,  
25 1983-2 Trade Cases Par. 65,506 (N.D. Cal. 1983).<sup>165</sup> In determining whether the FTC had to  
26

27 <sup>164</sup> DE 1238-1, Exh. 1617, Gubler depo., pp. 144:22-145:7.

28 <sup>165</sup> 1983 WL 1911 (N.D. Cal. 1983) (holding “the FTC may meet its burden by proving that the alleged dishonest or fraudulent practices were the type of misrepresentation on which a reasonably prudent

1 show that each purchaser subjectively relied on the defendant's material misrepresentations,  
 2 *International Diamond* drew heavily from *Blackie v. Barrack*,<sup>166</sup> the first case to apply FOTM.  
 3 *Blackie* held that "plaintiffs could be relieved of the burden of proving subjective reliance in  
 4 open market trading transactions where the purchasers relied on the prices set in the market and  
 5 where defendants' misrepresentation constituted a fraud on the market."<sup>167</sup> Based on *Blackie*,  
 6 the *International Diamond* court incorrectly concluded that proof of materiality establishes  
 7 causation because while "misrepresentations [are] a traditional prerequisite to recovery under  
 8 common law fraud actions, . . . [s]ubjective reliance is not a distinct element of proof in class  
 9 actions."<sup>168</sup>

10  
 11  
 12 After *International Diamond* was decided, the U.S. Supreme Court approved FOTM in  
 13 *Basic v. Levinson*.<sup>169</sup> However, the *Basic* Court rejected *Blackie*'s FOTM version, the exact  
 14 version *International Diamond* used to justify its reliance presumption. Justice White, in  
 15 writing for the dissent said he agreed with the majority in rejecting a version of the theory

16 which equates "causation" with "reliance" and permits recovery by a plaintiff  
 17 who claims merely to have been *harmed* by a material misrepresentation . . .  
 18 notwithstanding proof that the plaintiff did not in any way rely on [the  
 19 misrepresentation]. . . . A nonrebuttable presumption of reliance would  
 effectively convert Rule 10b-5 into 'a scheme of investor's insurance.'"<sup>170</sup>

20 The reliance presumption sought by the FTC does exactly what Justice White and the

21  
 22  
 23 person would rely, that they were widely disseminated, and that the injured consumers purchased . . .  
 from [the defendant].").

24 <sup>166</sup> 524 F. 2d 891 (9th Cir. 1975), cert. denied, 429 U. S. 816 (1976).

25 <sup>167</sup> *Int'l Diamond* at \*6.

26 <sup>168</sup> *Id.* at \*5

27 <sup>169</sup> *Basic Inc. v. Levinson*, 485 US 224 (1988).

28 <sup>170</sup> *Id.* at 251–52 (emphasis in original).

1 *Basic* Court rejected: It “equates causation with reliance,” and allows the FTC to claim  
 2 consumers have been harmed without proving that even one consumer relied on an alleged  
 3 misrepresentation. While it is true that requiring proof of subjective reliance by each consumer  
 4 would “thwart effective prosecution” of redress actions and “frustrate the statutory goals,”<sup>171</sup>  
 5 this does not justify allowing the FTC to claim reliance without showing subjective reliance by  
 6 at least a representative sample of consumers for each claimed misrepresentation.

8 Even if *Blackie* were considered good law, *International Diamond* misunderstood and  
 9 misapplied the case. According to *International Diamond*, “*Blackie* held that the requisite  
 10 causation is established by proof of purchase and the materiality of the misrepresentation.”<sup>172</sup>  
 11 This is not entirely accurate, because the purchase must be made *on a well-developed market*.  
 12 FOTM is based on the efficient-market hypothesis where the misrepresentation is factored into  
 13 the price of the security. *See Basic, supra*. This same principle does not translate to FTC  
 14 consumer redress actions. If causation does not equal reliance in a 10b-5 context, with the  
 15 backdrop of the efficient market to bolster the claim, then causation cannot possibly equal  
 16 reliance in a consumer redress action.

18 Last but not least, *Figgie* and other cases that rely on the FOTM/reliance doctrine may  
 19 soon have little precedential value, because the Supreme Court is expected to substantially  
 20 modify or overturn the doctrine entirely during the present term.<sup>173</sup>

22 Because the reliance presumption is based on a case that is no longer good law, and the  
 23

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25 <sup>171</sup> *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1282, 1293 (D.C.Minn.1985).

26 <sup>172</sup> *Int’l Diamond* at \*6.

27 <sup>173</sup> See <http://blogs.law.harvard.edu/corpgov/2013/12/04/supreme-court-to-consider-overruling-fraud-on-the-market-presumption/> (explaining likelihood of reversal or substantial modification this term).

entire underlying theory has been discredited and is of doubtful vitality, the FTC should be required to show at least a representative sample of consumers on each claimed material misrepresentation. Absent such evidence, summary judgment is not appropriate.

**B. The FTC has not shown that specific misrepresentations were “widely disseminated” in any event.**

Under the FTC’s own theory, to seek summary judgment on a misrepresentation, it must establish as a matter of law that the misrepresentation was “widely disseminated.” (*See* FTC Mem., p. 49.) The FTC’s motion does not address this element. In a single sentence, the FTC references the requirement, admits that it bears the burden of proof, and then – nothing. *Id.* Because it would be unfair for the FTC to brief an element for the first time in a reply memorandum, the FTC’s motion must be denied on this ground alone.

The lack of briefing requires the defendants to speculate as to what the FTC might have in mind on this element, but if the FTC believes that anything posted on the internet is widely disseminated, the Ninth Circuit has rejected that notion.<sup>174</sup>

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<sup>174</sup> *See Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1145 (9th Cir. 2009) (“Although we recognize the power of the internet to reach a wide and diverse audience, the evidence here is not sufficient to demonstrate wide dissemination.”). Many experts agree that there are close to one billion websites on the internet. See, e.g., 861,379,152 websites as of January 2014. Netcraft Ltd. (2014), <http://news.netcraft.com/>. Many of those sites receive no internet traffic. The mere existence of information on a webpage is not sufficient evidence to rise to the level of wide dissemination. During the pre-internet days of 1993 *Figgie*, it was logical to presume that consumers would use a brochure or pamphlet when deciding to purchase the seller’s product. The brochure or pamphlet created an inference of wide dissemination and reliance. The same inference cannot be applied to a webpage. Unlike printed materials that are fixed, the content of a webpage is constantly changing (and is supposed to change).

One consideration noted in the *Art Attacks* case was that the challenged web page was not generally available through internet searches. In this case, FTC investigators Tyndall and Jacobsen have admitted that, with many of the FTC’s exhibits, they had to “back in” to get to the pages, *i.e.*, type in specific URLs, or run specialized searches based on information they had previously received from third parties. DE 1241-1, Exh. 1655, Tyndall depo., pp. 87:9-88:19; Exh. 1801, Jacobsen depo., pp. 41:6-42:5, 101:23-102:13, 139:3-17 and DE 1254-5, Exh. 974 (Jacobsen Corrected 1st dec., ¶ 50 (URL–<https://secure2.securesiteorders.net/grants/1231/100/index1104-1.html>)).

Moreover, even if the FTC had shown accessibility, there were not enough sales on many of the disputed pages to show wide dissemination. The Ninth Circuit held in 2003 that a video was not considered widely disseminated after selling 17,000 copies.<sup>175</sup> Most of the sales pages for IWorks products did not approach even this number.<sup>176</sup>

Whether the alleged misrepresentations for which the FTC seeks redress were widely disseminated is a genuine issue of material dispute, and summary judgment is inappropriate.

**X. THE FTC’S REQUESTED MONETARY RELIEF IS UNSUPPORTED AND UNREASONABLE.**

The FTC seeks \$280,911,870 million for consumer redress, demanding all revenues for all products from all websites, regardless of the evidence. This all-or-nothing approach has not served the FTC well in other cases that actually went to trial.<sup>177</sup> In this case, apart from the Court’s lack of authority to enter a judgment exceeding the receivership estate (*see* Duane Fielding’s opposition to the FTC’s motion for summary judgment as to individual defendants), there are many potential outcomes of a trial. One outcome, of course, is a finding that the FTC has not proved its case at all. Another possibility is that the FTC will prove part of its case. And another possibility is that the FTC will prove all or part of its case on liability, but not on relief, or that certain amounts would have to be deducted. For example:

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<sup>175</sup> *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003).

<sup>176</sup> DE 1265-3, Exh 1760, pp. 6-7.

<sup>177</sup> For example, in *FTC v. Publishers Business Solutions*, 2:08-cv-00620-PMP-GWF, the FTC demanded “\$34,419,363.00 in gross revenues” as monetary relief. Judge Pro warned the FTC that he did not consider the FTC’s all-or-nothing position to be a reasonable approximation of such relief, and advised the FTC to present evidence regarding alternative measures of relief at an evidentiary hearing. *See id.*, DE 261, Transcript of 12/21/10 Pretrial Hearing at pp. 8-10; 13-14. The FTC declined, and after a trial, Judge Pro awarded \$191,219.00. *Id.*, DE 248. Although the Ninth Circuit later disagreed with one aspect of Judge Pro’s determination, the court expressly agreed that on remand, the trial court was not constrained by the FTC’s all-or-nothing proposition. *FTC v. Publishers Business Services*, 11-17270 (9th Cir. 2013) (unpub’d).



1           •       The defendants’ expert has testified, and the FTC has not controverted, that  
2 failing to monitor credit card statements and to notice charges beyond the second month is  
3 widely considered to be unreasonable consumer behavior.<sup>178</sup> Because the FTC Act only applies  
4 to consumers who act reasonably, if the factfinder finds this undisputed expert testimony  
5 persuasive, then the total amount the FTC seeks should be reduced to \$79,641,752.  
6

7           •       The FTC’s memorandum does not cite a single consumer who purchased the  
8 AdWords product, nor does the FTC have any evidence to contradict the defendants’ evidence  
9 regarding this product. If the factfinder agrees with this undisputed testimony, then  
10 \$85,873,283 must be subtracted from the FTC’s request.  
11

12           •       All evidence in the case contradicts the FTC’s claim that IWorks misrepresented  
13 the availability of (government) grants for personal needs, if “grant” is given the meaning  
14 ascribed by normal consumers. If a factfinder believes this undisputed evidence at trial, then  
15 \$118,992,726 must be subtracted from the FTC’s request.<sup>179</sup>  
16

17           •       If the Court determines that the FTC’s claim is derivative of unjust enrichment  
18 and that established economic principles and equity limit an award to net profits, then the pool  
19 of recovery is no more than \$49,033,072. Backing out Grant (\$19,238,760) and AdWords  
20 products (\$13,884,004), the maximum judgment would be \$15,910,308.  
21

22           •       Consumers uniformly testified that they expected to pay shipping and handling  
23  
24  
25

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26  
27 <sup>178</sup> DE 1262-1, Exh. 1426, Vigil Rept., pp. 12-16.

28 <sup>179</sup> *Id.*, p. 19.

1 for a “free” CD, and did not expect any refund of those amounts.<sup>180</sup> At a conservative average  
 2 of \$2.29 per CD purchase, and with at least 2,258,725 purchasers of the core grant product,  
 3 \$5,172,480.25 must be subtracted.<sup>181</sup>

4 • Regardless of other calculations, amounts will have to be subtracted that cannot  
 5 be determined until trial. For example, as discussed above, even under the FTC’s own theories,  
 6 sales from any websites that the FTC’s own documents show did not produce sales of at least  
 7 17,000 (or more) must be excluded. Sales from websites that advertised both government and  
 8 private grants must be excluded.

#### 10 **XI. ISSUES OF FACT EXIST ON THE FTC’S “COMMON ENTERPRISE” CLAIMS**

11 The FTC asserts a claim for common enterprise in an attempt to hold every company  
 12 named in the complaint jointly and severally liable for all relief that it seeks against only a few  
 13 entities actually involved in the operations of IWorks. (FTC Mem., pp. 36-46.) However, the  
 14 FTC’s facts either lack citation, are unsupported by the citation, or contradicted by other  
 15 evidence. The FTC also fails to tie the relief sought to the dates in which the various companies  
 16 came into existence or joined the enterprise.<sup>182</sup>

17 Examples of unsupported and disputed facts throughout the FTC’s common enterprise  
 18 assertion include:  
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 24 <sup>180</sup> See, e.g., DE 1237-1, Exh. 1600, Bachman depo., pp. 66:15–68:13 (knew about \$2.29 S/H); Exh.  
 25 1804, Blohm depo., pp. 33:25–34:14; Exh. 1620, Huffman depo., p. 39:1-12; 122:21–123:9; Exh. 1810,  
 Kizzie depo., p. 41:18-24; p. 44:19-23; DE 1240-2, Exh. 1647, Miller depo., pp. 18:15–19:7.

26 <sup>181</sup> DE 1262-1, Exh. 1426, Vigil Rept., p. 5 (number of purchasers).

27 <sup>182</sup> The FTC’s primary analysis regarding Anthon Holdings and Network Agenda is in its motion for  
 28 summary judgment against the individual defendants (in connection to defendant Duane Fielding).  
 Accordingly, these defendants’ liability is addressed in the response to that memorandum.

1           • IWorks could not assume all responsibility for web sites as the FTC alleges  
2 because the websites were not hosted on IWorks servers<sup>183</sup>;

3           • The one million refund and cancellation requests under the cited Disposition  
4 Report were not necessarily placed there because consumers were not informed about the  
5 monthly charges<sup>184</sup>;

6           • IWorks did not use scores of Processing Companies<sup>185</sup>;

7           • The IWorks Compliance Team was not routinely ignored as alleged by the FTC,  
8 and the testimony of the Kramm and Marker are limited to one short time period (December  
9 2008-August 2009)<sup>186</sup>.

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12  
13 <sup>183</sup> Exh. 1226 to Gubler Depo. (Feb. 2010 email to outside counsel. (Jeremy Johnson “we do not host any  
14 of the pages. They are always hosted by the different advertisers so we find ourselves in the position of  
15 policing them which has been increasingly difficult over past year.” Upsells through someone else’s  
offer were even more difficult to keep compliant.)

16 <sup>184</sup> FTC Investigator Tyndall admitted he did not know the criteria IWorks gave its representatives as to  
17 who was included in the various categories. He made his conclusions based on a review of only 100  
18 Customer calls out of millions of calls and chose not to preserve the evidence of even those he did look  
19 at. DE 1241-1, Exh. 1655, *Tyndall* depo., pp.193-195; DE 1238-1, Exh. 1617, *Gubler* depo., p. 266:2-11  
(for consumers who did not know about the charges it was because they did not read the disclosures not  
because they were not present or that they were hidden).

20 <sup>185</sup> Exh. 1831 ex. B is a graph that shows IWorks used only one and sometimes two processing accounts  
21 in 2006 and up through 2008. Even up to the middle of 2009, IWorks only used 3 processing accounts at  
22 any given time and only 6 in total. This is hardly “scores” of processing accounts. Six of the companies  
23 only performed check processing and 19 companies set up for processing, never processed at all. *Id.*  
24 Then for a little over 6 months in late 2009 IWorks, on the advice of their processing agents, began to  
25 utilize multiple processing accounts for each of the various entities to try and combat the fraud that had  
caused so many chargebacks that it resulted in the TMF of the account that had been used exclusively by  
IWorks up to that point. It is interesting that the FTC uses the fact that the many companies shared  
processing accounts as a reason to lump them into one common enterprise, but if IWorks tried to have  
multiple accounts for the different entities and products, the FTC labels that as somehow inappropriate  
and an indication of fraud. It should not be able to have an inference both ways for common enterprise.

26 <sup>186</sup> The FTC equates not giving an in-house attorney decision-making authority as ignoring the attorney.  
27 That is an odd assertion: Attorneys seldom are removed from their advisory (legal) role and put in  
28 decision-making (business) roles. Here, as discussed above, the advice of Gubler was followed in  
sending corrected websites to brokers, withholding payment, etc. That is one reason why brokers  
complained about IWorks’ stringent requirements.

1           Apart from these factual disputes, the FTC's claimed facts do not support a finding of  
2 common enterprise. Anthon Holdings is a good example. As set forth in Duane Fielding's  
3 separate response, Anthon Holdings has always been wholly separate from IWorks. It is logical  
4 that Anthon Holdings had IWorks handle the marketing and website service for Anthon because  
5 that was the agreement between the owners of the two companies. If sharing marketing creates  
6 a common enterprise liability, many companies who enter into marketing agreements where  
7 clients are provided both the marketing and customer service functions and other full service  
8 agreements would then create unintended common enterprise liability. Of course IWorks took  
9 care of marketing, websites and processing service – that is what IWorks contracted with  
10 companies to do, a useful service to new companies lacking the experience to market, and  
11 provide efficient and professional service to their customers. This does not create a common  
12 enterprise between the companies.  
13  
14

15           Finally, the one piece of information lacking from all of detail provided by the FTC on  
16 their common enterprise allegations is the date that the cited companies were created. The FTC  
17 seems unconcerned that at least five of these answering defendants<sup>187</sup> never even processed a  
18 single penny for any of the companies and are guilty of nothing but setting up a company and  
19 obtaining a processing account in late 2009. Based on that alone, the FTC seeks to assert a  
20 common enterprise and thus joint and several liability for actions of IWorks – and, more  
21 important, for actions taken before these entities were even in existence. So far, although the  
22 FTC has mentioned the dates these entities came into existence, it has ignored the fact that most  
23 were after June of 2009 – up to three and one half years after the alleged violations occurred.  
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28 <sup>187</sup> Revive Marketing, Inc., Success Marketing, Inc., Summit Processing, Inc., Tran Voyage, Inc., and  
TranFirst, Inc. *See* fn. 135.

1 In addition, the FTC has included three of these answering defendants that never  
 2 participated in credit card procession or debit card EFT charges.<sup>188</sup> As such, the FTC's  
 3 allegations of chargebacks, fraudulent processing accounts or the other "indicia of fraud" have  
 4 no bearing on them.  
 5

### 6 CONCLUSION

7 If the FTC truly believes it has overwhelming evidence against these defendants, it  
 8 should not fear a trial. For the reasons set forth above, the Defendants request the Court deny  
 9 the FTC's motion for summary judgment, and set this case for trial at the Court's earliest  
 10 convenience.  
 11

12 DATED this 19th day of January, 2014.

### 13 CHRISTENSEN & JENSEN, P.C.

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 26 *EBusiness Success, Inc., Elite Debit, Inc.*  
 27 *Funding Success, Inc., Hooper Processing, Inc.*  
 28 *I Works, Inc., Internet Economy, Inc.*

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<sup>188</sup> These processing only entities include Cold Bay Media, Inc., Elite Debit, Inc., Money Harvest, Inc.,

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*Internet Fitness, Inc., Market Funding Solutions, Inc.  
Money Harvest, Inc., Monroe Processing, Inc.  
Net Commerce, Inc., Premier Performance, Inc.  
Pro Internet Services, Inc., Revive Marketing, Inc.  
Success Marketing, Inc., Summit Processing, Inc.  
Tran Voyage, Inc., TranFirst, Inc.  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have on the 19th day of January, 2014, caused the foregoing document to be served on the following via the ECF system:

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